87-644
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES E. SCHMIDT, et al.,

Petitioners,

v.

DON SERPAS, et al.,

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX A

AMENDED OPINION

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2393

DON SERPAS, RAYMOND JOHNSON and CARL WATERS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

CHARLES E. SCHMIDT, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 4715—**Charles P. Kocoras**, *Judge.*

ARGUED APRIL 2, 1986—DECIDED JULY 17, 1987

Before CUDAHY and RIPPLE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* Plaintiffs brought this suit, individually and on behalf of all exercise persons, grooms and hot walkers (collectively, "backstretchers") at Illinois race tracks, seeking declaratory and injunctive relief from certain investigative practices authorized by the Illinois Racing Board (the "Board") and carried out by the Illinois Department of Law Enforcement ("IDLE") on the ground that these practices violated the Fourth Amendment, as applied to the state of Illinois through the Four-

teenth Amendment. The challenged practices included warrantless searches of the backstretchers' on-track dormitory rooms and investigatory stops and searches of the backstretchers' persons within the race track enclosure. Plaintiffs also challenged the Board's policy of granting them occupation licenses only upon their consent to these searches. The defendants argued that the plaintiffs lack a legitimate expectation of privacy owing to pervasive state regulation of the horse-racing industry, to the nature of the premises searched and to the plaintiffs' implied consent to the searches when they accepted their employment. The district court granted the plaintiffs' motion for a preliminary injunction and, later, enjoined the searches permanently on plaintiffs' motion for summary judgment. We affirm.

Backstretchers work at race tracks, feeding, grooming, exercising and generally taking care of the race horses. They are employed by the horses' trainers and licensed by the Board under authority vested in the Board by the Horse Racing Act of 1975 (the "Act"), Ill. Ann. Stat. ch. 8, para. 37 (Smith-Hurd Supp. 1987). Many of the backstretchers live in dormitory rooms located in the backstretch, which is the area where the horses are stabled. These rooms are owned by the race track and made available to the trainers and the backstretchers in their employ at no charge. Backstretchers do not have to live at the track, but many do so for reasons of convenience and economy.

Because backstretchers have contact with the race horses immediately before and between races, they are in a position to administer drugs or apply mechanical devices (called "buzzers") to the horses, both of which affect the speed of a horse and hence the outcome of a race. The Act forbids these practices. Ill. Ann. Stat. ch. 8, paras. 37-36, 37-37 (Smith-Hurd Supp. 1987). The Board and IDLE, which the legislature charged with the enforcement of the Act, Ill. Rev. Stat. ch. 8, para. 37-34 (1983), believe that warrantless searches of all backstretch areas, including the dormitories, and of licensees' persons is the only effective way of enforcing the statutory prohibitions against the use of drugs and buzzers. Backstretch areas

and licensees are searched when IDLE has received a "tip" or when irregularities are noted in a horse's performance; searches are also performed at random. We have no reason to question the Board's representations about the threat posed by drugs and buzzers and its need to take strong measures against them.

In this respect, the Act vests in the Board broad authority to regulate the horse-racing industry in Illinois. Specifically,

> The Board, and any person or persons to whom it delegates this power, is vested with the power to enter the office, horse race track, facilities and other places of business of any organization licensee to determine whether there has been compliance with the provisions of this Act and its rules and regulations.

Ill. Ann. Stat. ch. 8, para. 37-9(c) (Smith-Hurd Supp. 1987). Pursuant to its rulemaking powers, the Board has promulgated Thoroughbred Rules 322 and 25.19 (the "Rules"), which employ identical language and read as follows:

> (a) The Illinois Racing Board or the state steward investigating for violations of law or the Rules and Regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages that he may have by

virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment, and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule may have his license suspended or revoked.

(b) The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

The challenged searches were undertaken pursuant to this regulation.

The Act also empowers the Board to prescribe application forms and issue licenses to backstretchers. Ill. Ann. Stat. ch. 8, paras. 37-15, 37-20 (Smith-Hurd Supp. 1987). Prior to the entry of the preliminary injunction in this case, the license application form used by the Board quoted the text of the above Rules and conditioned the license's issuance upon consent to the searches authorized by the Rules.

The material facts about the searches of the named plaintiffs are undisputed.[1] Don Serpas, Raymond Johnson and Carl Waters are employed as grooms and live in residential quarters at Arlington Park Racetrack. Their residential quarters have been searched by IDLE agents; they have also been stopped and personally searched by

[1] The affidavits submitted by the parties differed in some of the details of the searches. The district court did not consider any of these disputes material. *See* Memorandum Opinion, *Serpas v. Schmidt*, No. 82-C-4715 (N.D. Ill. June 16, 1983), at 2 n.2. The appellants do not contest before this court the propriety of deciding the question presented to the district court by summary judgment.

IDLE agents within the race track enclosure. No evidence of crime was found during any of the challenged searches. The plaintiffs acknowledge that when they signed the license application forms, they consented to the searches. They also admit that they consented to each of the searches at the time it occurred. They claim, however, that they would not have consented to these warrantless searches if they had not been required to give consent in order to remain in a job as a backstretcher.

On July 30, 1982, these three plaintiffs filed a complaint in the Northern District of Illinois, naming as defendants present and former members of the Board, the director of IDLE and certain unknown IDLE agents and seeking injunctive and declaratory relief. On September 24, 1982 they filed a motion for a preliminary injunction, which was granted in its entirety on June 16, 1983. This order of the district court enjoined the defendants from (1) conducting or authorizing searches of persons and residential quarters without a warrant or probable cause; (2) conducting or authorizing investigatory stops of backstretchers without a reasonable suspicion, based on articulable facts, that the backstretchers stopped were engaged in criminal activity; and (3) conditioning the issuance of occupation licenses to backstretchers upon consent to these searches. Memorandum Opinion and Order, *Serpas v. Schmidt*, No. 82-C-4715 (N.D. Ill. June 16, 1983).

On September 19, 1983 the trial court certified Serpas, Johnson and Waters as named representatives of a class consisting of all grooms, exercise persons and hotwalkers at Illinois racetracks. In August and October 1984, the parties filed cross-motions for summary judgment. The trial court filed a memorandum opinion, granting the plaintiffs' motion and entering a permanent injunction on July 11, 1985. Memorandum Opinion, *Serpas v. Schmidt*, No. 82-C-4715 (N.D. Ill. July 11, 1985). This appeal followed.[2]

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[2] After oral argument we asked the parties to provide us with additional briefing on the question whether we should abstain and

(Footnote continued on following page)

[2] *continued*
permit the Illinois courts to rule on the state law issues in the case, thus arguably mooting the federal constitutional questions. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). This question was first raised at oral argument in the course of questioning by the panel.

After examining the supplemental briefs, we have concluded that abstention is not appropriate in this case. As the dissent correctly points out, this circuit has held that it might be proper in some cases for an appellate court to order abstention even though neither party had raised this issue. *See Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983). However, we do not think that it would be appropriate for us to order abstention *sua sponte* here. In the controversy before us, the federal courts are not "the lone guardian of the state's sovereign place under the Constitution," *infra*, p. 17; the defendants are state officials who raised no objection to having the claims against them litigated in federal court until this court itself raised the abstention issue. *See Houston v. Hill*, 55 U.S.L.W. 4823, 4828 n.16 (U.S. June 15, 1987) (failure of defendant city to raise possibility of abstention until after it had lost on the merits before an appellate court undercut the force of the city's argument); *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 848-49 (7th Cir. 1985) (State defendants did not request abstention until the end of trial; this is "an independent argument against abstention." "[I]f the responsible state officials are willing to litigate the case in federal court, that court does not *have* to force it back into state court.") (emphasis in original) (citation omitted).

In addition, there is a presumption in this circuit against abstaining once a case has gone to trial; this presumption holds at least "where neither party requested abstention before trial." *Mazanec*, 763 F.2d at 847. The district court in this case granted the plaintiffs' motion for a preliminary injunction in 1983 and enjoined the searches permanently in 1985 on plaintiffs' motion for summary judgment. The defendants did not raise an abstention issue during any of these proceedings, nor did they raise it before us. The dissent contends that *Mazanec* is not applicable to this case because *Mazanec* states that the presumption against abstaining may be rebutted if the state statute at issue could be interpreted narrowly and thus survive a constitutional challenge. *Infra*, p. 16 n.3. We believe, however, that the resolution of the constitutional issues in this case might well be necessary even if a state court found that the Act did not authorize the Rules. If the plaintiffs had validly consented to the searches or if they had a reduced

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A. Warrantless Searches of Dormitory Rooms

The Fourth Amendment protects against "unreasonable" searches and seizures. The reasonableness of a search depends upon a person's expectation of privacy in the place to be searched, provided that that expectation is one that society is willing to recognize as "reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Appellants contend that the backstretchers' asserted expectation of privacy in their on-track dormitory rooms is not the sort of expectation that society recognizes as reasonable. They rely on historic state regulation of the horse-racing industry, the less than commodious quality of the on-track quarters and the backstretchers' implied consent to the searches.

We have no doubt that horse racing is and ought to be a pervasively regulated industry. But a history of pervasive regulation of an industry is not by itself enough to render the warrant requirement superfluous. As we noted in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1079 (7th Cir. 1983),

> the degree and extent of past regulation comprise but a part, albeit a substantial part, of a determination of a "reasonable expectation of privacy" under the Fourth Amendment. Otherwise, no protections at all would be appropriate in closely regulated industries. The Fourth Amendment requires that a determination of the "reasonableness" of the intrusion be made. Even in closely regulated industries, the inspection provisions still must be tailored to the state's proper objectives, and they must minimize the dangers inherent in the unbridled exercise of administrative discretion.

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[2] *continued*
expectation of privacy, it certainly could be argued that the defendants would not have needed an independent basis of authority under state law to conduct the searches. Thus, abstention might not produce a state law result which would be dispositive of the claims under the federal constitution.

It is certainly true, as appellants point out, that the Supreme Court has sanctioned warrantless searches of commercial premises in certain industries subject to long-standing governmental oversight. *New York v. Burger*, 55 U.S.L.W. 4890 (U.S. June 19, 1987) (junkyards); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (alcoholic beverages). In each of these cases, however, an Act of Congress expressly authorized the terms and conditions of searches on specified premises. The rationale for not requiring a warrant in such a situation is that a statutory inspection program "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Dewey*, 452 U.S. at 603. In that way, there is assurance that the individual's privacy interest and the government's interest in law enforcement are properly balanced. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978) ("The reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute.").

The statutory authority claimed by the appellants for the searches challenged here states that the Board and its delegates are "vested with the power to enter the office, horse race track, facilities and other places of business" of any licensee to ensure compliance with the Racing Act. Ill. Ann. Stat. ch. 8, para. 37-9(c) (Smith-Hurd Supp. 1987). Far from specifying the "terms and conditions" under which warrantless searches of dormitory rooms can be conducted, this statute does not even appear to authorize searches of these areas. Appellants contend that the dormitory rooms are "facilities" for purposes of the Racing Act. We agree with the district court that this is not a reasonable reading of the statutory language. The provision specifically lists a series of places, ending with the catch-all "other places of business." This concluding phrase effectively defines the earlier listed places as places of business. The statute in no way suggests that a residence may be searched. We agree with the district court that these on-track dormitory

rooms must be considered the backstretchers' "homes" for Fourth Amendment purposes. Appellants point out that the rooms are very small and located either adjacent to or above the stables in the backstretch of the track. Further, they are only temporary lodgings and are accessible to track authorities by a master key. Nonetheless, they are exclusively residential, and lodgings as cramped, inhospitable or temporary have been considered residences by the courts. *See Stoner v. California*, 376 U.S. 483 (1964) (hotel rooms); *McDonald v. United States*, 335 U.S. 451 (1948) (rooming houses); *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975) (college dormitories). There is no evidence that the backstretchers conduct any of their business in the rooms; thus, cases such as *United States v. Cerri*, 753 F.2d 61 (7th Cir.), *cert. denied*, 472 U.S. 1017 (1985), where petitioner conducted his gun business out of his home, are distinguishable. Given the legal protection historically afforded the home by the Fourth Amendment, *see, e.g., United States v. United States District Court*, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"), we will not assume that the Illinois legislature meant to authorize warrantless residential searches unless it clearly stated this intention. Thus, because this statute does not even contemplate searches of residences, the statute does not provide any limitations on the discretion of track officials who wish to conduct searches of dormitory rooms. *Cf. Burger*, 55 U.S.L.W. 4890 (Warrantless search of automobile junkyard pursuant to statute was upheld; statutory scheme limited time, place and scope of such inspections.).

Even without explicit statutory authorization for these searches, the appellants contend that sufficient certainty of application to serve as a substitute for a warrant can be found in the regulatory scheme taken as a whole. We disagree. To satisfy the "certainty and regularity" requirement, an "inspection program must define clearly what is to be searched, who can be searched, and the frequency of such searches." *Bionic Auto Parts*, 721 F.2d at 1078.

The rules under which the IDLE agents operated do not impose any meaningful limitations on their discretion. As the district court noted,

> The searches may be focused or random and are not restricted to particular times nor restricted to particular areas or items in those areas which are in plain view. . . . [T]he agents may search plaintiffs' living quarters and personal effects as extensively as they wish. Plainly, the agents have an unrestricted scope of search; requiring them to hand out receipts or consent forms does not affect or limit the agent's discretion to undertake an exhaustive search of every personal effect in an individual's room.

Serpas v. Schmidt, supra, at [8]. The regulatory scheme here thus falls short of adequately substituting for a warrant. As the Supreme Court explained in rejecting a warrantless search scheme in *Camara v. Municipal Court,* 387 U.S. 523, 532-33 (1967), "[t]his is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."

There is no reason to doubt that drugs and mechanical devices pose major threats to the integrity of the horse racing industry. Nor do we question the reality of the Board's concerns about protecting horse racing without broad powers of surveillance over backstretchers and others. But the Fourth Amendment requires regularity of application and an impartial assessment of reasonableness, and neither the controlling statute nor the regulations in this case impose any restrictions on the conduct of warrantless searches of residences. Hence, we agree with the district court that neither the statute nor the regulatory scheme here is sufficient to except these searches from the general rule that searches conducted without the safeguard of a warrant are unreasonable and violate the Fourth Amendment, *see Johnson v. United States,* 333 U.S. 10, 13-14 (1948).

Finally, the appellants argue that the backstretchers impliedly consented to the searches by accepting occupation licenses conditioned upon compliance with Rules 322 and 25.19. Conditioning the receipt of a benefit, such as employment, on the relinquishment of a right that one would otherwise have is not *per se* unconstitutional. *See, e.g., Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973). The race track employees consented to the searches based on a regulatory program that required them to give their consent as a condition of employment. As we have already found, however, the regulations were not authorized by statute and were unconstitutional because neither the regulations nor the governing statute confined the discretion of the state officials conducting the searches. Thus, the validity of the employees' consent was vitiated by the fact that it was premised on the existence of the otherwise unauthorized and unconstitutional regulations.

B. Warrantless Searches of the Backstretchers

The district court also enjoined the Board and IDLE's practice of conducting warrantless stops and searches of the backstretchers' persons within the race track enclosure. Appellants have not suggested that we should analyze the personal searches any differently from the residential searches, and we, too, think that the same rules apply. Like searches of property, searches of the person are generally impermissible absent a warrant issued upon a determination of probable cause. *New York v. Belton*, 453 U.S. 454, 457 (1981); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1268 (7th Cir. 1983). The deficiencies we have noted in the statute and regulatory scheme apply equally to these personal searches, and the arguments based upon consent are equally unpersuasive in this context.[3] *Cf.*

[3] Appellants argue that we are bound to reverse the district court on the authority of the Supreme Court's summary affirmance of the unpublished decision of a three-judge panel in *Wilkey v. Illi-*

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Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir. 1986) (regulatory scheme that subjected jockeys to breathalyzer and urine tests was upheld against a Fourth Amendment challenge, in part, because discretion of officials conducting such searches was appropriately circumscribed by regulation), *cert. denied*, 107 S. Ct. 577 (1986).

As we have noted, we are certainly not unsympathetic to the appellants' argument that extraordinary surveillance procedures are necessary to preserve the integrity of horse racing. The simple fact is, however, that the Illinois statute and regulations fall far short of providing an adequate basis for the extraordinary procedures undertaken here.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[3] *continued*
nois Racing Board, No. 74-C-3524 (N.D. Ill. 1975), *aff'd*, 423 U.S. 802 (1975). In that case the court upheld a Board rule that authorized a personal search of a licensee veterinarian in the backstretch of the track. Unpublished opinions have no precedential effect in this circuit. *See* Circuit Rule 35. Summary affirmances by the Supreme Court do have some precedential effect, although they affirm the lower court's judgment only and not its rationale. Summary affirmances "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *Wilkey* involved a challenge by a Board-licensed veterinarian to Rule 322. He had lost his license after refusing to consent to a personal search. Precedential effect "is to be assessed in light of all of the facts of the case," *id.* at 177, and *Wilkey* is distinguishable, notably in that the Board argued that there was probable cause to search Wilkey. Further, we note that the Court affirmed *Wilkey* before its more recent pronouncements on the limits of the administrative search exception, *Marshall v. Barlow's, Inc.*, *supra*, and *Donovan v. Dewey*, *supra*. In light of these factors, we do not think we are bound by the Supreme Court's summary affirmance in *Wilkey*.

ESCHBACH, *Senior Circuit Judge*, dissenting. The federal courts should abstain from deciding this case to provide the state courts of Illinois an opportunity to construe the state statute at issue, thus potentially significantly altering or entirely mooting the constitutional inquiry. Thus, while I have no particular objection to the constitutional jurisprudence set forth in the majority opinion, I must dissent.

The challenged searches in the instant case were authorized by the Illinois Racing Board (the "Board") under Thoroughbred Rules 322 and 25.19 (the "Rules"), and were purportedly issued under the authority of the Horse Racing Act of 1975, as amended (the "Act"), Ill. Rev. Stat. ch. 8, § 37-9 (Smith-Hurd Supp. 1986). After undergoing searches of their persons and rooms at a racetrack pursuant to these Rules, the plaintiffs filed an action in federal district court, claiming a violation of 42 U.S.C. § 1983 (1982), and requesting damages as well as declaratory and injunctive relief.[1] The district court denied damages but issued a permanent injunction prohibiting defendants from enforcing the Rules via searches like those challenged. The trial court also declared the Rules invalid under the Fourth Amendment, a determination entirely unnecessary on the record in this case. Only the decisions on injunctive and declaratory relief have been challenged on appeal.

This court has a duty under the narrow strictures of *Pullman* abstention, *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S. Ct. 643 (1941), to maintain

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[1] Some justices have on occasion taken the position that *Pullman* abstention ought not to apply to cases brought under the Civil Rights Act, *see, e.g., Harrison v. NAACP*, 360 U.S. 167, 180-81, 79 S. Ct. 1025, 1032 (1959) (Douglas, J., dissenting, joined by Warren, C.J., and Brennan, J.); *Boehning v. Indiana State Employees Ass'n*, 423 U.S. 6, 8, 96 S. Ct. 168, 170 (1975) (Douglas, J., dissenting), but that position has never commanded a majority of the Court, and *Pullman* abstention remains applicable, *see, e.g. Boehning*, 423 U.S. at 6-8, 96 S. Ct. at 168-70 (per curiam).

the comity and federalism fundamental to the Constitution by avoiding unnecessary friction with the state courts. *See, e.g., Harrison v. NAACP*, 360 U.S. 167, 176, 79 S. Ct. 1025, 1030 (1959) (Harlan, J.). We also have a duty to avoid unnecessary constitutional adjudication. *See, e.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48, 56 S. Ct. 466, 482-83 (1936) (Brandeis, J., concurring).

The "paradigm of the 'special circumstances' " that must exist before invoking *Pullman*'s narrow exception to the exercise of federal jurisdiction is "a case where the challenged statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a constitutional question." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 306, 99 S. Ct. 2301, 2313 (1979) (quoting with approval *Kusper v. Pontikes*, 414 U.S. 51, 54, 94 S. Ct. 303, 306 (1973)); *see also Waldron v. McAtee*, 723 F.2d 1348, 1352 (7th Cir. 1983); *City Investing Co. v. Simcox*, 733 F.2d 56, 60 (7th Cir. 1980).

This is such a case. No Illinois court has yet addressed the question of whether the challenged searches and Rules under which they were made were beyond the authority of the Act. The majority here and the district court below both appear to believe the Rules invalid for precisely that reason. If the Rules are invalid, the challenged searches, *which exclusively relied upon the Rules*, are all also invalid, and the case is concluded without constitutional adjudication. Every personal and residential search in this action was performed by agents of the Illinois Department of Law Enforcement ("IDLE"), to whom the Board had delegated the authority to enforce the Rules. On the record in this case, the agents of IDLE claimed only the authority of the Rules for every search challenged. No other authority is claimed in the record to justify these searches. Even the occupational licenses required of each worker to gain employment were conditioned upon signing a consent to searches under the authority of the Rules. While the attorneys argued other authority to this court in their briefs, those arguments are merely legal arguments con-

structed after the institution of litigation. The crux of the matter is that the facts established by the record do not support a plea to any authority except the Rules to justify these searches, and the litigants cannot inject extraneous issues into the case via the briefs. Given the exclusive reliance by the IDLE agents on the Rules, the validity of the Rules is the only issue properly before this court, and it may well be decided by state law.

Thus this case calls for abstention because the statute leaves "reasonable room for a construction by the [state] courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially alter the problem." *Harrison*, 360 U.S. at 176, 79 S. Ct. at 1030; *see also Boehning v. Indiana State Employees Association*, 423 U.S. 6, 6-8, 96 S. Ct. 168, 168-70 (1975) (per curiam); *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 568 (7th Cir. 1986).

In this case, the Illinois courts obviously might provide a limiting construction that would place the challenged searches beyond the Act, *see Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321, 2327 (1984) (significant possibility of a limiting construction justifies abstention); *Harrison*, 360 U.S. at 176, 79 S. Ct. at 1030 (abstaining because of significant possibility of limiting construction); *see also Lynk*, 789 F.2d at 568, for the Act does not specifically or explicitly authorize either personal or residential searches. Such an interpretation of the Act would significantly alter, if not entirely moot, the constitutional question. The strong possibility of such a limiting construction should deter us from declaring the issue so clear that we will not first defer to a state court's interpretation of its own law. *Cf. Kusper v. Pontikes*, 414 U.S. 51, 94 S. Ct. 303 (1973) (abstention improper because state law not susceptible of an interpretation that might avoid constitutional adjudication); *Harman v. Forssenius*, 380 U.S. 528, 534-35, 85 S. Ct. 1177, 1182 (1965) (same); *Board of Education v. Bisworth*, 713 F.2d 1316, 1321 (7th Cir. 1983) (same).

It might be argued that it is inappropriate to order abstention at the appellate level when the issue was not

raised below or suggested by the parties on appeal.[2] But we have recently held otherwise. In *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983), we held that "the court has the power and in an appropriate case the duty to order abstention, if necessary for the first time at the appellate level, even though no party is asking for it." *Id.* at 1351. Our duty is to the federalism inherent in the Constitution, and we are thereby bound to respect the sovereignty of the states and to avoid unnecessary constitutional adjudication.[3]

Procedural concerns bolster the argument for abstention in this case. The purpose of legal procedure is to expedite the full and frank consideration of substantive legal disputes. If the appellate courts do not order abstention where it is appropriate simply because it was not raised below, litigants will be encouraged to avoid abstention by excluding crucial state issues from their pleadings. Such a practice would place abstention largely in the hands of the litigants, and in many cases the individual goals of each litigant may counsel avoidance of abstention, thus obscuring and perhaps emasculating the interests of the sovereign states in the regulation of their own affairs. When a case presents issues meeting the threshold requirements necessary to invoke the narrow doctrine of *Pull-*

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[2] We raised the potential applicability of abstention at the oral argument on appeal, and the parties then filed briefs on the issue at our request.

[3] We recently held in *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 848 (7th Cir. 1985), that a trial court had abused its discretion by ordering abstention subsequent to the date trial was concluded, and three years after litigation was commenced. *Mazanec* itself distinguished *Waldron* by noting that in *Waldron* there was a significant possibility that the statute would be held unconstitutional as it stood, but that the state might "save" it by limiting it to pass constitutional muster. *Id.* at 848. The facts at bar are similar to *Waldron*; a state court's interpretation of the Rules and the Act might avoid the necessity of striking down a state law or regulation on constitutional grounds. Thus *Waldron* is the appropriate precedent to apply to the case at bar.

man abstention, the court may be the lone guardian of the state's sovereign place under the Constitution. We should not shirk that duty.

The majority suggests in a footnote that even if the Act does not authorize the challenged searches, we would still be required to reach the defendants' constitutional arguments based on the plaintiffs' consents to the searches. I do not agree. The Board conditioned the granting of employment licenses upon consent to the Rules, and the district court found that the employees' individual consents at the time of each search were given under the threat of dismissal based upon the authority of the Rules. The invalidation of the Rules would preclude any future search based upon consent to the Rules, and would prevent the use of consent forms requiring consent to such searches under the authority of the Rules. If the Rules no longer exist, searches may not be based on their authority.

It should also be noted that even with the Rules and consents invalidated, the plaintiffs would still have to show the trial court that they continued to meet the threshold requirements necessary to support an injunction. While the district court found that "in the absence of permanent injunction, they [the plaintiffs] will continue to have their houses and persons searched without a warrant," it apparently did not consider the effect invalidating the Rules would have on police behavior. It is pure speculation to posit that the agents of IDLE would continue these searches subsequent to the invalidation of the Rules; indeed, the agents conducted the personal and residential searches in the backstretch area only in reliance upon the validity of the Rules, as the record shows. There are no findings regarding this crucial point in the district court's opinion, and this silence highlights the fundamental weakness in the majority's opinion: the validity of the searches absent the Rules was not presented to the district court under the record in this case, and should not be at issue before this court.

The majority also contends that the invalidity of the Rules would not dispose of the defendants' constitutional argument based upon a reduced expectation of privacy due to pervasive government regulation of the horse racing industry. I disagree. The pleadings do not place this defense in issue except in reference to the validity of the Rules. Throughout this action, neither party has raised the argument that the searches were authorized in the absence of the Rules.[4] While the parties may have intended or hoped to put such a theory into this case by their briefs to this court, the record here does not do so, and this court is not at liberty to resolve issues not pre-

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[4] In their answer the defendants pleaded that sections 37-2 and 37-15 of the Act both independently authorized the Rules, even if section 37-9 did not. Defendants never again explicitly cited, argued, or relied upon the putative authority provided by these sections, and plaintiffs only cursorily argued their insufficiency in authorizing the Rules. More importantly, the district court appears to have decided that the two sections were not at issue, or that the arguments based upon them were so frivolous as to not even require comment, for the court made no mention of them in its opinion. Whatever the statutory or constitutional merits of arguments based upon these sections, they are still framed to authorize the Rules, not to directly authorize searches in the absence of the Rules. Thus their invocation does not affect the focus of this dissent, which is that the validity of the Rules under state law is a crucial question whose resolution will significantly alter or entirely moot the constitutional issues in this case.

The defendants did raise an affirmative defense that "warrantless searches and seizures and investigatory stops of occupational licensees within the race track enclosure do not violate the Fourth Amendment to the United States Constitution since horse racing licensees have notice of the likelihood of warrantless searches by the pervasiveness of regulation and by the long history of governmental regulation of this business." (Citations omitted.) However, defendants did not explicitly make clear whether "pervasiveness of regulation" in this defense included the challenged Rules, and the ubiquitous reliance upon the Rules throughout the rest of the defendants' pleadings and briefs strongly suggest that this defense also relied upon the validity of the Rules. Surely defendants would have explicitly announced any claims they believed authorized the searches in the absence of the Rules.

sented by the record on appeal. *In re Peter Bear*, 789 F.2d 577, 579 (7th Cir. 1986); *Johnson v. Levy Organization Development Co.*, 789 F.2d 601, 611 (7th Cir. 1986)

Nevertheless, the majority today has gone beyond state law unnecessarily and has decided a constitutional issue not presented to the court. With all due respect, such a decision is ill-advised. My concern is not merely technical; while the parties have addressed themselves to the constitutional requirements necessary to authorize a search under a particular legislative scheme detailing requirements for such searches, the parties have not directly confronted the constitutionality of such searches made without explicit statutory guidelines, probable cause, or reasonable suspicion in a pervasively regulated industry. This court should not rule upon the issue until a case presents it and does so without also presenting a potentially dispositive and uncertain issue of state law. Otherwise, the court suffers the absence of the sharp definition of issues and exhaustive consideration of legal argument such a case would provide. The case presented to us turns on an unclear issue of state law whose resolution may obviate and would almost certainly significantly alter the need for constitutional adjudication. I would abstain.

On Petition for Rehearing

Before BAUER, *Chief Judge*, CUMMINGS, CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*. On January 30, 1987, the defendants-appellants filed a petition for rehearing with suggestion of rehearing en banc. A majority of the panel voted to deny the petition for rehearing. Judge Eschbach voted to grant the petition. The petition is accordingly denied. A judge in regular active service requested a vote on the suggestion of rehearing en banc. In light of the amended opinion of the panel filed today, the suggestion of rehearing en banc did not secure a majority. Judges Posner, Coffey, Easterbrook, and Manion voted to grant rehearing en banc. Judge Wood did not participate in the consideration or decision of this case.

EASTERBROOK, *Circuit Judge*, with whom POSNER, COFFEY, and MANION, *Circuit Judges*, join, dissenting from the denial of rehearing en banc.* The panel's opinion, as amended, holds that Ill. Rev. Stat. ch. 8 §37-9(c) does not authorize the Illinois Racing Board to conduct administrative searches of living cubicles at race tracks. Then it declares Thoroughbred Rule 322 and Harness Racing Rule 25.19 unconstitutional on two grounds: warrantless searches unauthorized by statute bear a special burden of justification, and the regulations do not contain standards to guide the discretion of the administrative officials. All of the track's backstretchers consented to the searches, but the court says that the consents are invalid because the state did not have the authority to search over objec-

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* *Senior Circuit Judge* ESCHBACH, although ineligible to vote on the suggestion of rehearing en banc, joins this opinion as an explanation of his vote in favor of rehearing by the panel.

tion. Finally, the court deals with searches of the backstretchers' persons at the track. Having made so much of its conclusion that §37-9(c) authorizes the search of business premises but not living cubicles, the panel nonetheless holds that "the same rules apply" to searches conducted on the business premises.

If the panel had said: "Searches of living quarters and persons require either a warrant or some criteria limiting the discretion of the officers, criteria Illinois does not supply", this would be a plausible though problematic disposition. *New York v. Burger*, 55 U.S.L.W. 4890 (U.S. June 19, 1987), holds that police may search regulated businesses (in *Burger* auto junkyards) without a warrant, a regular pattern, or any announced criteria. The Court rejected a claim that the searches must be predictable, pointing out that to the extent people can tell when the police will arrive, they can use that knowledge to hide evidence of wrongdoing. 55 U.S.L.W. at 4891 n.2, 4895-96 & nn. 21, 22. *Burger* does not use the approach of *Bionic Auto Parts & Sales, Inc. v. Fahner*, 721 F.2d 1072 (7th Cir. 1983), another junkyard case on which the panel heavily relied. See 808 F.2d 601, 604-06. *Bionic* said that each inspection must be justified and conducted to "minimize the dangers" of random searches (721 F.2d at 1079); *Burger* held that only the program of searches requires justification, and that particular searches do not need additional support. But *Burger* does not deal with searches of persons and living quarters located on business premises, and sooner or later the Court will have to do so. The Board can amend its rules and avoid the difficulty, or press on to the only Court that can resolve the issue. We could add little by trying to apply *Burger* and similar cases to the searches of living quarters and backstretchers.

But the panel did not stop with the observation that searches of persons and their living quarters are different from searches of the rest of the business premises; it did not even start there. It started by making an independent decision on a question of state law, as if the state were just another litigant. It used the conclusion about state

law as a basis of its constitutional decision. This approach is highly questionable. So is the panel's treatment of consent. The panel's approach to the interpretation of state laws could govern many cases, as would its handling of consent. Long after Ill. Rev. Stat. ch. 8 §37-9(c), Thoroughbred Rule 322, and Harness Racing Rule 25.19 have been amended or forgotten, we will have to live with the principles the majority used. These principles deserve more attention than they have received.

1. If the backstretchers had filed a suit under the diversity jurisdiction seeking judicial review of the rules on the ground that they are unauthorized by statute, the suit would have been dismissed because the eleventh amendment deprives the district court of authority to adjudicate such suits. If the backstretchers had filed a suit under 42 U.S.C. §1983 and added a pendent claim under state law, they still would have lost. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) (*Pennhurst II*), holds that a federal court may not award relief against a state on the basis of state law. As the Court said, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 465 U.S. at 106. Yet that is exactly what the panel has done. It has concluded that the Board does not understand state law and used that as the springboard of its constitutional holding.

The panel's award of relief was not based directly on state law. So the panel may take comfort from *Ex parte Young*, 209 U.S. 123 (1908). But *Pennhurst II* depends not on the eleventh amendment but on principles of immunity that have developed in the shadow of that amendment. It establishes the proper role of federal courts in telling state governments the meaning of state law. That a federal court possesses constitutional power to revise a state's view of the state's law does not imply that the court should do so. Four justices, dissenting in *Pennhurst II*, argued that a state, with its choice of poison, would prefer to lose on state rather than constitutional grounds,

and that a federal court does well to avoid the constitutional issue. 465 U.S. at 159-63 (Stevens, J., dissenting). The Court nonetheless rejected this position. No justice in *Pennhurst II* suggested that a court should use state statutory grounds to create a constitutional problem on which the state then would lose. In *Pennhurst II* resort to state grounds would have obviated a federal issue; in this case, the panel's holding on state law set the state up for a fall on a federal issue.

There are at least five ways to find out what state law means in a case like ours. One is to accept the view of the executive branch of the state. A second is to certify the question to the supreme court of the state. A third is to abstain, as Judge Eschbach urged in dissent from the panel's opinion. A fourth is to review the issue of state law with at least the deference given the statutory interpretations of federal agencies. A fifth is to decide the meaning of the law de novo, as if this were a dispute between private parties. The panel ignored three of these methods and brushed aside abstention, proceeding to give its views on the meaning of state law unencumbered by deference to the state's interpretation. This is no way to treat state governments.

I suggested in *Huggins v. Isenbarger*, 798 F.2d 203, 207-09 (7th Cir. 1986) (concurring opinion), that the best approach is the first: to accept the position of the State of Illinois on the meaning of the state's law. The Illinois Racing Board interpreted Ill. Rev. Stat. ch. 8 §37-9(c) when it issued its rules. The Attorney General of Illinois filed a brief in this court representing that the Board's construction of state law is correct. No state court has questioned this. The State of Illinois thus has presented us with an authoritative construction of its law. If the state had spoken through the Supreme Court of Illinois, we would treat the court's interpretation as beyond our ken; we would accept it merely because the court had said it. Why should we listen *only* to state courts and ignore the views of other officials of the state? Many constructions of law come from courts, but courts pronounce only

when necessary to decide cases; executive officials construe laws for other purposes, cf. *Carson v. Block*, 790 F.2d 562, 565 (7th Cir. 1986); *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 (7th Cir. 1985). When executive officials are authorized to construe the law, they speak for the state as authoritatively as courts do. Unless a federal court may choose who speaks for the state, the court ought to respect the views of whoever *has* spoken for the state. Cf. *Hilton v. Braunskill*, 107 S. Ct. 2113, 2120 (1987); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477-80 (1977); *Barrera v. Young*, 794 F.2d 1264, 1269 (7th Cir. 1986). How Illinois apportions governmental powers, including the power to construe statutes, is none of our concern. *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 n.13 (1974); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902); *United Beverage Co. v. Indiana Alcoholic Beverage Commission*, 760 F.2d 155 (7th Cir. 1985). Cf. *City of Newport v. Iacobucci*, 107 S. Ct. 383, 385-86 (1986). Illinois has supplied us with an interpretation of its statute, which we should accept unless set aside by processes sufficient under the law of Illinois.

Perhaps the Attorney General is not authorized by state law to speak for Illinois. We should give the views of the executive branch the sort of respect provided by state law. *National Surety Corp. v. Midland Bank*, 551 F.2d 21, 26 (3d Cir. 1977). Thus if the Attorney General's status as an advocate diminishes the force of his views, or if the Attorney General's view is trumped by that of a court, we should respect that allocation of governmental powers. *Huggins*, 798 F.2d at 208-09. But it is commonplace for courts to defer to the views of federal agencies and of the Solicitor General of the United States—even when those views are advanced during litigation. E.g., *Japan Whaling Ass'n v. American Cetacean Society*, 106 S. Ct. 2860, 2867-68 (1986); *Haig v. Agee*, 453 U.S. 280, 291

(1981). States, which need not adopt the same separation of powers found within the federal government, may give greater force to statutory interpretations of executive officials. The parties have not addressed the extent to which the Board's, and the Attorney General's, construction of §37-9(c) is authoritative under state law. We certainly ought not assume, as the panel does, that it is worthless. In *Pennhurst II* the plaintiffs relied on an opinion of the Supreme Court of Pennsylvania, which the court of appeals held showed that the legal position of the executive branch of Pennsylvania was untenable. The Supreme Court held that even the views of the highest court of Pennsylvania did not allow a federal court to override the executive branch's construction of Pennsylvania law. Why may we disagree with the executive branch of Illinois when no state court has spoken?

Certification of the state law question would be one way to avoid this difficulty—at least when the eleventh amendment is not in play, see *Citizens for John W. Moore Party v. Board of Election Commissioners*, 781 F.2d 581, 584-86 (7th Cir. 1986) (dissenting opinion)—but the panel did not certify the question. Abstention is another way to obtain the views of the state courts. The panel in our case declined to abstain, pointing out that abstention disrupts the progress of the case and is not a sound way to proceed when raised belatedly. Yet the high costs of abstention do not explain why the panel did not certify the question. Certification entails neither the costs nor the delay associated with abstention and is appropriate when the statute is susceptible of multiple interpretations. *Houston v. Hill*, 55 U.S.L.W. 4823, 4828-29 (U.S. June 15, 1987). Surely either is preferable to holding an entire administrative scheme unconstitutional because unsupported by state law. Even belated abstention is attractive if the alternative is the federal court's substitution of its judgment for the state officials'.

There is one more option: deference to the state agency's construction of state law, as we would defer to a federal agency's construction of federal law. If the Board's rules

had been issued by a federal agency, we would have asked not whether the construction is right but whether it is reasonable. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 862-66 (1984); *Watkins v. Blinzinger*, 789 F.2d 474, 478 (7th Cir. 1986). The regulations were promulgated under a law giving the Board authority to inspect the "race track, facilities and other places of business" of the licensees. The panel says that the Board may not inspect the living cubicles at the track because "other places of business" "effectively defines the earlier listed places as places of business." This is the *eiusdem generis* approach. A reasonable person might deny the applicability or force of this saw, see *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 587-89 (1980); *United States v. Turkette*, 452 U.S. 576, 581-82 (1981), but even if applicable this canon does not answer all questions. The cubicles are *part of* the "race track [and] facilities" of the racing licensee, and they promote the operation of the racing business. Licensees make quarters available at the track for their convenience, not because they want to operate apartment houses. The backstretchers may regard the cubicles as residences, but the licensees regard them as part of the track complex. The statute authorizes the Board to inspect the facilities, track, and business *of the licensees*; that the licensee's place of business is someone else's hotel room does not necessarily confine the Board's statutory power. Cf. *United States v. Cerri*, 753 F.2d 61 (7th Cir. 1985) (agents may search a gun dealer's home without a warrant, if he chooses to do business at home). As in *Chevron*, the legislature does not appear to have considered, and therefore it has not settled, the problem at hand.

There is, moreover, a different way to read the statute: it authorizes inspection of the track proper, and of "other places of business" away from the track. Racing licensees do not use the tracks year 'round; sometimes more than one licensee uses a track; every licensee has some place of business away from the track. The function of the "other places of business" language then is not to close

some portions of race tracks to the Board but to ensure that the Board can follow the business wherever the licensee goes. This reading is consistent with the reasons the Board is authorized to inspect. Papers suggesting improprieties may be hidden anywhere the licensee may be found; drugs given to horses may be hidden at the track and elsewhere. It would be most surprising if the Board may not inspect at least every corner of the race track proper for drugs, forbidden implements, and suspicious papers. Yet under the panel's decision, the licensee can put part of the track off limits by the expedient of inviting an employee to sleep there. That is not an inevitable reading of the statute, one so compelling that we would say that a federal agency exceeded its power in reading the statute to embrace the whole track. The panel treated the meaning of "race track [and] facilities" as a pure question of law on which it could take a clear shot. It is not appropriate for a federal court to give less deference to a state agency's interpretation of a state statute than to a federal agency's interpretation of a federal statute; the distinction cuts the other way.

2. The panel scrutinized the statutory authority for the Board's rules because it believed that searches are more readily sustained if conducted on statutory authority. Maybe so for searches by federal officials, because a federal court should respect Congress' decision that a category of searches is "reasonable". *United States v. Watson*, 423 U.S. 411, 416 (1976). But because states need not observe the separation of functions that prevails within the federal government, they may entrust to executive officials the task of deciding for the political branches what is reasonable. No case I have found even hints that a search by a state official, under color of state regulations, is any different for constitutional purposes from a search under color of a state statute; indeed the distinction between "statute" and "regulation" presupposes a separation of functions that states are free to modify. Many cases sustain state searches, conducted on administrative, regulatory, or no authorization, without suggesting that a

statute would have supplied a firmer base. E.g., *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987); *Colorado v. Bertine*, 107 S. Ct. 738 (1987). See also *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), and *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), both sustaining administrative searches that were supported entirely by regulations. The fourth amendment does not allow administrative officials to issue warrants but is otherwise silent on who makes policy for Illinois concerning administrative searches. *Illinois v. Krull*, 107 S. Ct. 1160 (1987), holds that evidence gathered under authority of a state statute later declared unconstitutional may be used in a criminal case, but this is based on considerations peculiar to the exclusionary rule rather than on a belief that legislation is better than a regulation at declaring the policy of Illinois about the propriety of administrative searches. State regulations and state statutes should have equal weight when the question is: "what does society believe is a 'reasonable' administrative search?".

At all events, the searches of the backstretchers' persons at the track are authorized by *both* statute and regulation; the track (outside the backstretchers' cubicles) is a place of business of the licensee, so the regulation is authorized even on the panel's treatment of §37-9(c). This search has all the support the State of Illinois as a whole can furnish. The court has necessarily declared §37-9(c) unconstitutional as applied to personal searches at the track.

3. The backstretchers were required to consent to searches as a condition of their employment. The panel's approach to these consents is to say that because the state cannot search the backstretchers' cubicles or persons against their will, the state cannot require consent either. This has the curious consequence that consent is valid whenever it is not needed (because the state may conduct the search without consent) and invalid whenever it is necessary (because the state is forbidden to search over objection). This eliminates consent as a ground for search.

Although the panel does not articulate its rationale, it must be making an "unconstitutional conditions" argument. The state did not ask for consent, as in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It made consent a condition of employment. "Consent" extracted by threat of a violation of one's constitutional rights is not effective; it is no different from the proposal "your money or your life", because either option makes the person worse off. Another panel of the court recently held that "consent" extracted by a threat of disbarment is valid, see *Lewis v. Lane*, 816 F.2d 1165, 1169 (7th Cir. 1987), and I wonder how these decisions may be reconciled, but that is not my principal concern.

Ours is not a simple "unconstitutional condition". The panel did not hold that administrative searches of backstretchers' quarters and persons always violate the fourth amendment. It has held only that the searches are unauthorized by statute and that the regulations are (so far) insufficiently detailed. There has never been a doctrine of "unstatutory conditions" or "insufficiently circumscribed regulatory conditions". Why can't people be asked to consent to a kind of search that the statute has not yet authorized?

Moreover, the state demands consent only from those who live or work at the track. Employees are free to live elsewhere and avoid searches of their quarters. This is one of the grounds on which courts sustain airport searches: you can't board a plane without consenting to a search, but you can travel by car or train if you like. So too at the track. The demand is not unconditional; the employee controls the security of his quarters by his choice of abode. The panel's decision casts a pall over all consents in which the choice is genuine because the person has a right to say no by choosing another line of work, another place to live, a different mode of travel, and so on.

Some recent cases call the unconstitutional conditions doctrine itself into question. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980), holds that an employee may surrender by contract his first amendment right to speak;

the Court did not think it important that the consent was required as a condition of employment. *Buckley v. Valeo*, 424 U.S. 1, 54-58 & n.62 (1976), holds that the government may condition monetary support for political campaigns on a surrender of the constitutional right to spend unlimited sums for speech. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968, 2979 (1986), uses the principle that the greater power (to ban gambling) includes the lesser power (to condition a gambling permit on surrender of some first amendment rights). "The greater power includes the lesser" is the traditional antagonist of the "unconstitutional conditions" principle. An inferior federal court may not proceed as if the doctrine of unconstitutional conditions were in perfect health.

Neither the panel's proposition that consent is ineffectual when the government lacks the power to impose its will over objection, nor the contrasting view of *Lewis* that knuckling under to a show of authority is voluntary, is very attractive. To determine whether acquiescence in the face of a demand is significant, we must evaluate the nature and strength of the reasons for the demand (as the Supreme Court did in *Snepp*), the options open to the person faced with the demand (here to obtain quarters off the track's premises or to change jobs), the extent to which the scope of any consent is reasonable in light of the purposes to be served, and so on. Many cases say that the government may demand consent when it has strong reasons. The airport search cases are good examples. Searches at race tracks also vindicate important interests. The panel did not deny that the government has a substantial interest in keeping drugs away from horses (and jockeys, see *Shoemaker*, 795 F.2d at 1141-43); it apparently did not believe that the strength of the state's interest is relevant. When there are strong reasons for conducting a search, when the demand affects only a tiny portion of the jobs available in the state (so that saying no and changing jobs is a real option), when the consent approves a search that fits the need like a glove—

in short, in this case—the state may use the consent even if it may not act over objection.

If the backstretchers' consents are valid, then the state may carry out its searches even if the Board's regulations do not sufficiently confine the agents' discretion. And if these regulations are inconsistent with the fourth amendment, our court ought to give the right reasons for that conclusion. The panel's opinion does not give Illinois the deference in the interpretation of state law that is its due, and the panel's preference for legislation over regulation requires the state to conform its governance to the panel's views of how states ought to be organized. The questions of principle glossed over by the panel's opinion are far more important than the outcome of this case, and they are worth the extra judicial time necessary to get them right.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2393

DON SERPAS, RAYMOND JOHNSON and CARL WATERS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

CHARLES E. SCHMIDT, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 4715—**Charles P. Kocoras**, *Judge.*

ARGUED APRIL 2, 1986—DECIDED DECEMBER 19, 1986

Before CUDAHY and RIPPLE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* Plaintiffs brought this suit, individually and on behalf of all exercise persons, grooms and hot walkers (collectively, "backstretchers") at Illinois race tracks, seeking declaratory and injunctive relief from certain investigative practices authorized by the Illinois Racing Board (the "Board") and carried out by the Illinois Department of Law Enforcement ("IDLE") on the ground that these practices violated the Fourth Amendment, as applied to the State of Illinois through the Fourteenth Amendment. The challenged practices included warrantless searches of the backstretchers' on-track dorm-

itory rooms and investigatory stops and searches of the backstretchers' persons within the race track enclosure. Plaintiffs also challenged the Board's policy of granting them occupation licenses only upon their consent to these searches. The defendants argued that the plaintiffs lack a legitimate expectation of privacy owing to pervasive state regulation of the horse-racing industry, the nature of the premises searched and the plaintiffs' implied consent to the searches when they accepted their employment. The district court granted the plaintiffs' motion for a preliminary injunction and, later, enjoined the searches permanently on plaintiffs' motion for summary judgment. We affirm.

I.

Backstretchers work at race tracks, feeding, grooming, exercising and generally taking care of the race horses. They are employed by the horses' trainers and licensed by the Board under authority vested in the Board by the Horse Racing Act of 1975 (the "Act"), Ill. Rev. Stat. ch. 8 § 37 (Smith-Hurd Supp. 1986). Many of the backstretchers live in dormitory rooms located in the backstretch, which is the area where the horses are stabled. These rooms are owned by the race track and made available to the trainers and the backstretchers in their employ at no charge. Backstretchers do not have to live at the track, but many do so for reasons of convenience and economy.

Because backstretchers have contact with the race horses immediately before and between races, they are in a position to administer drugs or apply mechanical devices (called "buzzers") to the horses, both of which affect the speed of a horse and hence the outcome of a race. The Act forbids these practices. Ill. Rev. Stat. ch. 8, §§ 37-36, 37-37. The Board and IDLE, which the legislature has charged with the enforcement of the Act, *id.* § 37-34, believe that warrantless searches of all backstretch areas, including the dormitories, and of licensees' persons constitute the only effective way of enforcing the statutory prohibitions against the use of drugs and buzzers. Backstretch areas and licensees are searched when IDLE has received a "tip"

or when irregularities are noted in a horse's performance; searches are also performed at random. We have no reason to question the Board's representations about the threat posed by drugs and buzzers, and the need to take strong measures against them.

In this respect, the Act vests in the Board broad authority to regulate the horse-racing industry in Illinois. Specifically,

> The Board, and any person or persons to whom it delegates this power, is vested with the power to enter the office, horse race track, facilities and other places of business of any organization licensee to determine whether there has been compliance with the provisions of this Act and its rules and regulations.

Ill. Rev. Stat. ch. 8, § 37-9(c). Pursuant to its rulemaking powers, the Board has promulgated Thoroughbred Rule 322 and Harness Racing Rule 25.19 (the "Rules"), which employ identical language and read as follows:

> (a) The Illinois Racing Board or the state steward investigating for violations of law or the Rules and Regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each em-

ployee of a licensed operator, in accepting his employment, and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule may have his license suspended or revoked.

(b) The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

The challenged searches were undertaken pursuant to this regulation.

The Act also empowers the Board to prescribe application forms and issue licenses to backstretchers. Ill. Rev. Stat. ch. 8, §§ 37-15, 37-20. Prior to the entry of the preliminary injunction in this case, the license application form used by the Board quoted the text of the above Rules and conditioned the license's issuance upon consent to the searches authorized by the Rules.

The material facts about the searches of the named plaintiffs are undisputed.[1] Don Serpas, Raymond Johnson and Carl Waters are employed as grooms and live in residential quarters at Arlington Park Racetrack. Their residential quarters have been searched by IDLE agents; they have also been stopped and personally searched by

[1] The affidavits submitted by the parties differed in some of the details of the searches. The district court did not consider any of these disputes material. *See Serpas v. Schmidt*, No. 82-C-4715, mem. op. at 2 n.2 (N.D. Ill. June 16, 1983). The appellants do not contest before this court the propriety of deciding the question presented to the district court by summary judgment.

IDLE agents within the race track enclosure. No evidence of crime was found during any of the challenged searches. The plaintiffs acknowledge that when they signed the license application forms, they consented to the searches. They also admit that they consented to each of the searches at the time it occurred. They claim, however, that they would not have consented to these warrantless searches if they had not been required to give consent in order to remain in a job as a backstretcher.

On July 30, 1982, these three filed a complaint in the Northern District of Illinois, naming as defendants present and former members of the Board, the director of IDLE and certain unknown IDLE agents and seeking injunctive and declaratory relief. On September 24, 1982, they filed a motion for a preliminary injunction, which was granted in its entirety on June 16, 1983. This order of the district court enjoined the defendants from (1) conducting or authorizing searches of persons and residential quarters without a warrant or probable cause; (2) conducting or authorizing investigatory stops of backstretchers without a reasonable suspicion, based on articulable facts, that the backstretchers stopped were engaged in criminal activity; and (3) conditioning the issuance of occupation licenses to backstretchers upon consent to these searches. *Serpas v. Schmidt*, No. 82-C-4715, mem. op. (N.D. Ill. June 16, 1983).

On September 19, 1983, the trial court certified Serpas, Johnson and Waters as named representatives of a class consisting of all grooms, exercise persons and hot walkers at Illinois race tracks. In August and October 1984, the parties filed cross-motions for summary judgment. The trial court filed a memorandum opinion, granting the plaintiffs' motion and entering a permanent injunction on July 11, 1985. *Serpas v. Schmidt*, No. 82-C-4715, mem. op. (N.D. Ill. July 11, 1985). This appeal followed.[2]

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[2] After oral argument, we asked the parties to provide us with additional briefing on the question whether we should abstain and

(Footnote continued on following page)

[2] *continued*
permit the Illinois courts to rule on the state law issues in the case, thus arguably mooting the federal constitutional questions. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). This question was first raised at oral argument in the course of questioning by the panel.

After examining the supplemental briefs, we have concluded that abstention is not appropriate in this case. As the dissent correctly points out, this circuit has held that it might be proper in some cases for an appellate court to order abstention even though neither party had raised this issue. *See Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983). However, we do not think that it would be appropriate for us to order abstention *sua sponte* here. In the controversy before us, the federal courts are not "the lone guardian of the state's sovereign place under the Constitution," *infra* p. 17; the defendants are state officials who raised no objection to having the claims against them litigated in federal court until this court itself raised the abstention issue. *See Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 848-49 (7th Cir. 1985) (State defendants did not request abstention until the end of trial; this is "an independent argument against abstention." "[I]f the responsible state officials are willing to litigate the case in federal court, that court does not *have* to force it back into state court.") (emphasis in original) (citation omitted).

In addition, there is a presumption in this circuit against abstaining once a case has gone to trial; this presumption holds at least "where neither party requested abstention before trial." *Mazanec*, 763 F.2d at 847. The district court in this case granted the plaintiffs' motion for a preliminary injunction in 1983 and enjoined the searches permanently in 1985 on plaintiffs' motion for summary judgment. The defendants did not raise an abstention issue during any of these proceedings, nor did they raise it before us. The dissent contends that *Mazanec* is not applicable to this case because *Mazanec* states that the presumption against abstaining may be rebutted if the state statute at issue could be interpreted narrowly and thus survive a constitutional challenge. *Infra* p. 16 n.3. We believe, however, that the resolution of the constitutional issues in this case might well be necessary even if a state court found that the Act did not authorize the Rules. If the plaintiffs had validly consented to the searches or if they had a reduced expectation of privacy, it certainly could be argued that the defendants would not have needed an independent basis of authority under state law to conduct the searches. Thus, abstention might not produce a state law result which would be dispositive of the claims under the federal Constitution.

II.

A. Warrantless Searches of Dormitory Rooms

The Fourth Amendment protects against "unreasonable" searches and seizures. The reasonableness of a search depends upon a person's expectation of privacy in the place to be searched, provided that that expectation is one that society is willing to recognize as "reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Appellants contend that the backstretchers' asserted expectation of privacy in their on-track dormitory rooms is not the sort of expectation that society recognizes as reasonable. They rely on historic state regulation of the horse-racing industry, the less than commodious quality of the on-track quarters and the backstretchers' implied consent to the searches.

We have no doubt that horse racing is and ought to be a pervasively regulated industry. But a history of pervasive regulation of an industry is not by itself enough to render the warrant requirement superfluous. As we noted in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1079 (7th Cir. 1983),

> the degree and extent of past regulation comprise but a part, albeit a substantial part, of a determination of a "reasonable expectation of privacy" under the Fourth Amendment. Otherwise, no protections at all would be appropriate in closely regulated industries. The Fourth Amendment requires that a determination of the "reasonableness" of the intrusion be made. Even in closely regulated industries, the inspection provisions still must be tailored to the state's proper objectives, and they must minimize the dangers inherent in the unbridled exercise of administrative discretion.

It is certainly true, as appellants point out, that the Supreme Court has sanctioned warrantless searches of commercial premises in certain industries subject to long-standing governmental oversight. *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp. v. United*

States, 397 U.S. 72 (1970) (alcoholic beverages). In each of these cases, however, an act of Congress expressly authorized the terms and conditions of searches on specified premises. The rationale for not requiring a warrant in such a situation is that a statutory inspection program "in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Dewey*, 452 U.S. at 603. In that way, there is assurance that the individual's privacy interest and the government's interest in law enforcement are properly balanced. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321 (1978) ("The reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute.").

The statutory authority claimed by the appellants for the searches challenged here states that the Board and its delegates are "vested with the power to enter the office, horse race track, facilities and other places of business" of any licensee to ensure compliance with the Act. Ill. Rev. Stat. ch. 8, § 37-9(c). Appellants contend that the dormitory rooms are "facilities" for purposes of the Act. We agree with the district court that this is not a reasonable reading of the statutory language. The provision specifically lists a series of places, ending with the catch-all "other places of business." This concluding phrase effectively defines the earlier listed places as places of business. The statute in no way suggests that a residence may be searched.

We agree with the district court that these on-track dormitory rooms must be considered the backstretchers' "homes" for Fourth Amendment purposes. Appellants point out that the rooms are very small and located either adjacent to or above the stables in the backstretch of the track. Further, they are only temporary lodgings and are accessible to track authorities by a master key. Nonetheless, they are exclusively residential, and lodgings as cramped, inhospitable or temporary have been considered residences by the courts. *See Stoner v. California*, 376 U.S. 483 (1964) (hotel rooms); *McDonald v. United States*,

335 U.S. 451 (1948) (rooming houses); *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975) (college dormitories). There is no evidence that the backstretchers conduct any of their business in the rooms; thus, cases such as *United States v. Cerri*, 753 F.2d 61 (7th Cir.), *cert. denied*, 105 S. Ct. 3479 (1985), where petitioner conducted his gun business out of his home, are distinguishable. Given the historical legal protection afforded the home by the Fourth Amendment, *see, e.g., United States v. United States District Court*, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"), we will not assume that the Illinois legislature means to authorize warrantless residential searches unless it clearly states this intention.

There is no reason to doubt that drugs and mechanical devices pose major threats to the integrity of the horse racing industry. Nor do we question the reality of the Board's concerns about protecting horse racing without broad powers of surveillance over backstretchers and others. But the Fourth Amendment requires regularity of application and an impartial assessment of reasonableness, and these will be lacking when there is no adequate basis for regulatory searches in the controlling statute. Here, there is simply no authority for adopting a set of practices, significantly involving searches of residences and of the person, merely by publishing regulations that have no clear tie to the statute.

Even without explicit statutory authorization for these searches, the appellants contend that sufficient certainty of application to serve as a substitute for a warrant can be found in the regulatory scheme taken as a whole. We disagree. First, the Supreme Court has placed great weight on legislative determinations of the necessity for warrantless searches, *see Dewey*, 452 U.S. at 600 ("[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary . . . ."); *Biswell*, 406 U.S. at 315 (legality of search depends on "authority of a valid statute"); *Colonnade*, 397

U.S. at 76-77 (stressing Congress' reasonable exercise of its broad authority to regulate liquor industry). Even so, to satisfy the "certainty and regularity" requirement, an "inspection program must define clearly what is to be searched, who can be searched, and the frequency of such searches." *Bionic Auto Parts*, 721 F.2d at 1078. The rules under which the IDLE agents operated do not impose any meaningful limitations on their discretion. As the district court noted,

> The searches may be focused or random and are not restricted to particular times nor restricted to particular areas or items in those areas which are in plain view. . . . [T]he agents . . . may search plaintiffs' living quarters and personal effects as extensively as they wish. Plainly, the agents have an unrestricted scope of search; requiring them to hand out receipts or consent forms does not affect or limit the agent's discretion to undertake an exhaustive search of every personal effect in an individual's room.

Serpas v. Schmidt, No. 82-C-4715, mem. op. at [8] (N.D. Ill. July 11, 1985). The regulatory scheme here thus falls short of adequately substituting for a warrant. As the Supreme Court explained in rejecting a warrantless search scheme in *Camara v. Municipal Court*, 387 U.S. 523, 532-33 (1967), "[t]his is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." Hence, we agree with the district court that neither the statute nor the regulatory scheme here is sufficient to except these searches from the general rule that searches conducted without the safeguard of a warrant are unreasonable and violate the Fourth Amendment, *see Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

Finally, the appellants argue that the backstretchers impliedly consented to the searches by accepting occupation licenses conditioned upon compliance with Rules 322 and 25.19. We think that the district court approached this contention properly when it noted that "the issue is not whether consent can be implied, but whether, absent the

condition, the challenged searches are constitutional." *Serpas v. Schmidt*, No. 82-C-4715, mem. op. at [11-12] (N.D. Ill. July 11, 1985). While it is true that those who enter highly regulated fields do so with notice of an administrative search scheme and that this affects their expectation of privacy, *see Dewey*, 452 U.S. at 600 (when regulation sufficiently comprehensive, owner "cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes"), it is also clear that "the legality of the search depends not on consent but on the authority of a valid statute." *Biswell*, 406 U.S. at 315. As we have noted, these searches, standing alone, are unconstitutional. The Board may not issue a license conditioned simply on the applicant's consent to waive a constitutional right. *See, e.g., Cole v. Richardson*, 405 U.S. 676 (1972) (public employment may not be conditioned on waiver of First Amendment rights); *Spevack v. Klein*, 385 U.S. 511 (1967) (license to practice law may not be conditioned upon waiver of Fifth Amendment rights); *Armstrong v. New York State Commissioner of Correction*, 545 F. Supp. 728 (N.D.N.Y. 1982) (employment as prison guard may not be conditioned upon waiver of Fourth Amendment rights). The district court also correctly ruled that the fact that the named plaintiffs actually consented to each search before it was performed is irrelevant given the posture of this case. Whether or not plaintiffs consented to these searches in the past, their status as licensees subjects them to the threat of searches in the future.

B. Warrantless Searches of the Backstretchers

The district court also enjoined the Board and IDLE's practice of conducting warrantless stops and searches of the backstretchers' persons within the race track enclosure. Appellants have not suggested that we should analyze the personal searches any differently from the residential searches, and we, too, think that the same rules apply. Like searches of property, searches of the person are generally impermissible absent a warrant issued upon a determination of probable cause. *New York v. Belton*, 453

U.S. 454, 457 (1981); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1268 (7th Cir. 1983). The deficiencies we have noted in the statute and regulatory scheme apply equally to these personal searches, and the arguments based upon consent are equally unpersuasive in this context.[3]

As we have noted, we are certainly not unsympathetic to the appellants' argument that extraordinary surveillance procedures are necessary to preserve the integrity of horse racing. The simple fact is, however, that the Illinois statute falls far short of providing an adequate basis for the extraordinary procedures undertaken here.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[3] Appellants argue that we are bound to reverse the district court on the authority of the Supreme Court's summary affirmance of the unpublished decision of a three-judge panel in *Wilkey v. Illinois Racing Board*, No. 74-C-3524 (N.D. Ill. 1975), *aff'd*, 423 U.S. 802 (1975). In that case, the court upheld a Board rule that authorized a personal search of a licensee veterinarian in the backstretch of the track. Unpublished opinions have no precedential effect in this circuit. *See* Circuit Rule 35. Summary affirmances by the Supreme Court do have some precedential effect, although they affirm the lower court's judgment only and not its rationale. Summary affirmances "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *Wilkey* involved a challenge by a Board-licensed veterinarian to Rule 322. He had lost his license after refusing to consent to a personal search. Precedential effect "is to be assessed in the light of all of the facts [of the] case," *id.* at 177, and *Wilkey* is distinguishable, notably in that the Board argued that there was probable cause to search Wilkey. Further, we note that the Court affirmed *Wilkey* before its more recent pronouncements on the limits of the administrative search exception, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, and *Donovan v. Dewey*, 452 U.S. 594. In light of these factors, we do not think we are bound by the Supreme Court's summary affirmance in *Wilkey*.

ESCHBACH, *Senior Circuit Judge*, dissenting. The federal courts should abstain from deciding this case to provide the state courts of Illinois an opportunity to construe the state statute at issue, thus potentially significantly altering or entirely mooting the constitutional inquiry. Thus, while I have no particular objection to the constitutional jurisprudence set forth in the majority opinion, I must dissent.

The challenged searches in the instant case were authorized by the Illinois Racing Board (the "Board") under Thoroughbred Rules 322 and 25.19 (the "Rules"), and were purportedly issued under the authority of the Horse Racing Act of 1975, as amended (the "Act"), Ill. Rev. Stat. ch. 8, § 37-9 (Smith-Hurd Supp. 1986). After undergoing searches of their persons and rooms at a racetrack pursuant to these Rules, the plaintiffs filed an action in federal district court, claiming a violation of 42 U.S.C. § 1983 (1982), and requesting damages as well as declaratory and injunctive relief.[1] The district court denied damages but issued a permanent injunction prohibiting defendants from enforcing the Rules via searches like those challenged. The trial court also declared the Rules invalid under the Fourth Amendment, a determination entirely unnecessary on the record in this case. Only the decisions on injunctive and declaratory relief have been challenged on appeal.

This court has a duty under the narrow strictures of *Pullman* abstention, *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 61 S. Ct. 643 (1941), to maintain

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[1] Some justices have on occasion taken the position that *Pullman* abstention ought not to apply to cases brought under the Civil Rights Act, *see, e.g., Harrison v. NAACP*, 360 U.S. 167, 180-81, 79 S. Ct. 1025, 1032 (1959) (Douglas, J., dissenting, joined by Warren, C.J., and Brennan, J.); *Boehning v. Indiana State Employees Ass'n*, 423 U.S. 6, 8, 96 S. Ct. 168, 170 (1975) (Douglas, J., dissenting), but that position has never commanded a majority of the Court, and *Pullman* abstention remains applicable, *see, e.g., Boehning*, 423 U.S. at 6-8, 96 S. Ct. at 168-70 (per curiam).

the comity and federalism fundamental to the Constitution by avoiding unnecessary friction with the state courts. *See, e.g., Harrison v. NAACP*, 360 U.S. 167, 176, 79 S. Ct. 1025, 1030 (1959) (Harlan, J.). We also have a duty to avoid unnecessary constitutional adjudication. *See, e.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48, 56 S. Ct. 466, 482-83 (1936) (Brandeis, J., concurring).

The "paradigm of the 'special circumstances' " that must exist before invoking *Pullman*'s narrow exception to the exercise of federal jurisdiction is "a case where the challenged statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a constitutional question." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 306, 99 S. Ct. 2301, 2313 (1979) (quoting with approval *Kusper v. Pontikes*, 414 U.S. 51, 54, 94 S. Ct. 303, 306 (1973)); *see also Waldron v. McAtee*, 723 F.2d 1348, 1352 (7th Cir. 1983); *City Investing Co. v. Simcox*, 733 F.2d 56, 60 (7th Cir. 1980).

This is such a case. No Illinois court has yet addressed the question of whether the challenged searches and Rules under which they were made were beyond the authority of the Act. The majority here and the district court below both appear to believe the Rules invalid for precisely that reason. If the Rules are invalid, the challenged searches, *which exclusively relied upon the Rules*, are all also invalid, and the case is concluded without constitutional adjudication. Every personal and residential search in this action was performed by agents of the Illinois Department of Law Enforcement ("IDLE"), to whom the Board had delegated the authority to enforce the Rules. On the record in this case, the agents of IDLE claimed only the authority of the Rules for every search challenged. No other authority is claimed in the record to justify these searches. Even the occupational licenses required of each worker to gain employment were conditioned upon signing a consent to searches under the authority of the Rules. While the attorneys argued other authority to this court in their briefs, those arguments are merely legal arguments con-

structed after the institution of litigation. The crux of the matter is that the facts established by the record do not support a plea to any authority except the Rules to justify these searches, and the litigants cannot inject extraneous issues into the case via the briefs. Given the exclusive reliance by the IDLE agents on the Rules, the validity of the Rules is the only issue properly before this court, and it may well be decided by state law.

Thus this case calls for abstention because the statute leaves "reasonable room for a construction by the [state] courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially alter the problem." *Harrison*, 360 U.S. at 176, 79 S. Ct. at 1030; *see also Boehning v. Indiana State Employees Association*, 423 U.S. 6, 6-8, 96 S. Ct. 168, 168-70 (1975) (per curiam); *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 568 (7th Cir. 1986).

In this case, the Illinois courts obviously might provide a limiting construction that would place the challenged searches beyond the Act, *see Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321, 2327 (1984) (significant possibility of a limiting construction justifies abstention); *Harrison*, 360 U.S. at 176, 79 S. Ct. at 1030 (abstaining because of significant possibility of limiting construction); *see also Lynk*, 789 F.2d at 568, for the Act does not specifically or explicitly authorize either personal or residential searches. Such an interpretation of the Act would significantly alter, if not entirely moot, the constitutional question. The strong possibility of such a limiting construction should deter us from declaring the issue so clear that we will not first defer to a state court's interpretation of its own law. *Cf. Kusper v. Pontikes*, 414 U.S. 51, 94 S. Ct. 303 (1973) (abstention improper because state law not susceptible of an interpretation that might avoid constitutional adjudication); *Harman v. Forssenius*, 380 U.S. 528, 534-35, 85 S. Ct. 1177, 1182 (1965) (same); *Board of Education v. Bisworth*, 713 F.2d 1316, 1321 (7th Cir. 1983) (same).

It might be argued that it is inappropriate to order abstention at the appellate level when the issue was not

raised below or suggested by the parties on appeal.[2] But we have recently held otherwise. In *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983), we held that "the court has the power and in an appropriate case the duty to order abstention, if necessary for the first time at the appellate level, even though no party is asking for it." *Id.* at 1351. Our duty is to the federalism inherent in the Constitution, and we are thereby bound to respect the sovereignty of the states and to avoid unnecessary constitutional adjudication.[3]

Procedural concerns bolster the argument for abstention in this case. The purpose of legal procedure is to expedite the full and frank consideration of substantive legal disputes. If the appellate courts do not order abstention where it is appropriate simply because it was not raised below, litigants will be encouraged to avoid abstention by excluding crucial state issues from their pleadings. Such a practice would place abstention largely in the hands of the litigants, and in many cases the individual goals of each litigant may counsel avoidance of abstention, thus obscuring and perhaps emasculating the interests of the sovereign states in the regulation of their own affairs. When a case presents issues meeting the threshold requirements necessary to invoke the narrow doctrine of *Pull-*

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[2] We raised the potential applicability of abstention at the oral argument on appeal, and the parties then filed briefs on the issue at our request.

[3] We recently held in *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 848 (7th Cir. 1985), that a trial court had abused its discretion by ordering abstention subsequent to the date trial was concluded, and three years after litigation was commenced. *Mazanec* itself distinguished *Waldron* by noting that in *Waldron* there was a significant possibility that the statute would be held unconstitutional as it stood, but that the state might "save" it by limiting it to pass constitutional muster. *Id.* at 848. The facts at bar are similar to *Waldron*; a state court's interpretation of the Rules and the Act might avoid the necessity of striking down a state law or regulation on constitutional grounds. Thus *Waldron* is the appropriate precedent to apply to the case at bar.

man abstention, the court may be the lone guardian of the state's sovereign place under the Constitution. We should not shirk that duty.

The majority suggests in a footnote that even if the Act does not authorize the challenged searches, we would still be required to reach the defendants' constitutional arguments based on the plaintiffs' consents to the searches. I do not agree. The Board conditioned the granting of employment licenses upon consent to the Rules, and the district court found that the employees' individual consents at the time of each search were given under the threat of dismissal based upon the authority of the Rules. The invalidation of the Rules would preclude any future search based upon consent to the Rules, and would prevent the use of consent forms requiring consent to such searches under the authority of the Rules. If the Rules no longer exist, searches may not be based on their authority.

It should also be noted that even with the Rules and consents invalidated, the plaintiffs would still have to show the trial court that they continued to meet the threshold requirements necessary to support an injunction. While the district court found that "in the absence of permanent injunction, they [the plaintiffs] will continue to have their houses and persons searched without a warrant," it apparently did not consider the effect invalidating the Rules would have on police behavior. It is pure speculation to posit that the agents of IDLE would continue these searches subsequent to the invalidation of the Rules; indeed, the agents conducted the personal and residential searches in the backstretch area only in reliance upon the validity of the Rules, as the record shows. There are no findings regarding this crucial point in the district court's opinion, and this silence highlights the fundamental weakness in the majority's opinion: the validity of the searches absent the Rules was not presented to the district court under the record in this case, and should not be at issue before this court.

The majority also contends that the invalidity of the Rules would not dispose of the defendants' constitutional argument based upon a reduced expectation of privacy due to pervasive government regulation of the horse racing industry. I disagree. The pleadings do not place this defense in issue except in reference to the validity of the Rules. Throughout this action, neither party has raised the argument that the searches were authorized in the absence of the Rules.[4] While the parties may have intended or hoped to put such a theory into this case by their briefs to this court, the record here does not do so, and this court is not at liberty to resolve issues not pre-

[4] In their answer the defendants pleaded that sections 37-2 and 37-15 of the Act both independently authorized the Rules, even if section 37-9 did not. Defendants never again explicitly cited, argued, or relied upon the putative authority provided by these sections, and plaintiffs only cursorily argued their insufficiency in authorizing the Rules. More importantly, the district court appears to have decided that the two sections were not at issue, or that the arguments based upon them were so frivolous as to not even require comment, for the court made no mention of them in its opinion. Whatever the statutory or constitutional merits of arguments based upon these sections, they are still framed to authorize the Rules, not to directly authorize searches in the absence of the Rules. Thus their invocation does not affect the focus of this dissent, which is that the validity of the Rules under state law is a crucial question whose resolution will significantly alter or entirely moot the constitutional issues in this case.

The defendants did raise an affirmative defense that "warrantless searches and seizures and investigatory stops of occupational licensees within the race track enclosure do not violate the Fourth Amendment to the United States Constitution since horse racing licensees have notice of the likelihood of warrantless searches by the pervasiveness of regulation and by the long history of governmental regulation of this business." (Citations omitted.) However, defendants did not explicitly make clear whether "pervasiveness of regulation" in this defense included the challenged Rules, and the ubiquitous reliance upon the Rules throughout the rest of the defendants' pleadings and briefs strongly suggest that this defense also relied upon the validity of the Rules. Surely defendants would have explicitly announced any claims they believed authorized the searches in the absence of the Rules.

sented by the record on appeal. *In re Peter Bear*, 789 F.2d 577, 579 (7th Cir. 1986); *Johnson v. Levy Organization Development Co.*, 789 F.2d 601, 611 (7th Cir. 1986).

Nevertheless, the majority today has gone beyond state law unnecessarily and has decided a constitutional issue not presented to the court. With all due respect, such a decision is ill-advised. My concern is not merely technical; while the parties have addressed themselves to the constitutional requirements necessary to authorize a search under a particular legislative scheme detailing requirements for such searches, the parties have not directly confronted the constitutionality of such searches made without explicit statutory guidelines, probable cause, or reasonable suspicion in a pervasively regulated industry. This court should not rule upon the issue until a case presents it and does so without also presenting a potentially dispositive and uncertain issue of state law. Otherwise, the court suffers the absence of the sharp definition of issues and exhaustive consideration of legal argument such a case would provide. The case presented to us turns on an unclear issue of state law whose resolution may obviate and would almost certainly significantly alter the need for constitutional adjudication. I would abstain.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

[Dated July 11, 1985]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SERPAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4715
	)	
SCHMIDT, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, *District Judge*:

This matter comes before the Court on the plaintiffs' motion for summary judgment. Plaintiffs seek an order declaring Illinois' Thoroughbred Rule 322 and Harness Racing Rule 25.19 unconstitutional under the Fourth and Fourteenth Amendments, permanently enjoining defendants from engaging in certain acts under the authority of those Rules, and holding defendants liable for authorizing and conducting unlawful stops and searches. Defendants oppose plaintiffs' motion and request summary judgment in their favor. For the reasons which follow, the plaintiffs' motion is granted in part and denied in part.

The plaintiffs in this action are Don Serpas, Raymond Johnson, and Carl Waters, individually and on behalf of

the class of all occupation licensees of the Illinois Racing Board who serve as exercise persons, grooms, and hotwalkers at Illinois racetracks (the plaintiffs).[1] Each named plaintiff lives in residential quarters at Arlington Park Racetrack provided to him in connection with his work. The defendants are former and present members of the Illinois Racing Board, the director of the Illinois Department of Law Enforcement (IDLE), and unknown agents of IDLE. On a motion for a preliminary injunction, the plaintiffs challenged the constitutionality of certain searches conducted under the authority of Thoroughbred Rule 322 and Harness Rule 25.19 (the Rules).[2] The plaintiffs made three arguments against the Rules' application and challenged: (1) the warrantless searches of their residences; (2) the investigatory stops and searches of their persons within the race track enclosure; and (3) the conditioning of their occupation licenses upon their consent to such searches. On June 16, 1983, this Court granted the plaintiffs' motion and preliminarily enjoined the challenged activities. *Serpas v. Schmidt*, Memorandum Opinion (N.D. Ill. June 16, 1983) (hereinafter Mem. Op.).[3]

Plaintiffs now move for summary judgment and defendants have made a cross-motion for summary judgment as well. Summary judgment shall be granted when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The underlying facts and all inferences to be drawn from them must be viewed in the light most favorable to the party opposing the motion. *Fitzsimmons v. Best*, 528 F.2d 692, 694 (7th Cir. 1976). A material question of fact is one which is outcome determinative under the governing law. *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir. 1983). Whether there is a disputed question of fact to be presented to the trier of fact is, in the first instance, a question of law for the Court to determine.

The legal issues in the action fall into three parts: (1) whether Fourth Amendment protection is afforded plaintiffs during warrantless searches of their living quarters;

(2) whether the investigatory stops and searches of the plaintiffs' person while in the race track enclosure are unconstitutional under the Fourth Amendment; and (3) whether the Rules unconstitutionally condition the occupation license on consent to the searches.

Warrantless Residential Searches

In issuing the preliminary injunction, this Court placed the burden upon the defendants to show their warrantless residential searches, taken pursuant to the Rules, fell into a recognized exception to the warrant requirement of the Fourth Amendment. *See Camara v. Municipal Court*, 307 U.S. 523 (1967). In opposing the plaintiffs' summary judgment motion, defendants now contest the initial premise that the Fourth Amendment is applicable at all to the plaintiffs' allegations. Defendants assert that the searches take place within the context of the horse racing industry, an industry with such a long history of regulation that "no reasonable expectation of privacy exists within the industry." *United States v. Harper*, 617 F.2d 35 (4th Cir. 1980). Therefore, defendants argue, plaintiffs are without any reasonable expectations of privacy and are necessarily outside the scope of Fourth Amendment protection. Defendants rely upon a variety of factors—a long history of warrantless racetrack searches, the public and plaintiffs' knowledge of the searches, and the "commercial" nature of the plaintiffs' living quarters. This reliance is misplaced.

Without doubt, defendants accurately assert that horse racing is a highly regulated industry and that the State has an interest in maintaining the industry's integrity. *Phillips v. Graham*, 86 Ill.2d 274, 427 N.E.2d 550 (1981). Moreover, the Supreme Court has clearly recognized that warrantless searches in closely regulated industries can be reasonable. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). Under this exception to the Fourth Amendment's warrant requirement, courts have found that by accepting the benefits of a highly regulated trade, an individual

also accepts the burden of regulation and thereby consents to administrative investigations or inspections. *Marshall v. Wait*, 628 F.2d 1255, 1258 (9th Cir. 1980). Therefore, the individual operating within a highly regulated industry can have no reasonable expectation of privacy *at least as to administrative inspections. Id.* (*emphasis added*).

From this administrative inspection case law, defendants conclude that plaintiffs cannot have a reasonable expectation of privacy in their living quarters located within the racetrack grounds. To accept this conclusion, this Court must accept defendants' necessary first premise—that the warrantless searches of plaintiffs' living quarters are administrative inspections. This court cannot accept the characterization of the residential searches as administrative inspections because: (A) the warrantless searches are conducted on private, residential premises, not commercial premises; (B) the statute's language in this case does not provide an adequate substitute for a warrant; (C) the regulatory scheme present does not provide an adequate substitute for a warrant; and (D) a balance of plaintiffs' privacy interests and the Government's enforcement needs favors the plaintiffs.

(A) *Residential Nature of Plaintiffs' Quarters*

The administrative inspection exception to the Fourth Amendment's warrant requirement extends to commercial or public premises. An administrative search of commercial premises and a warrantless search of a private residence are afforded very different degrees of protection. *Donovan v. Dewey*, 452 U.S. at 598-99. Defendants acknowledge these differences, but justify the warrantless searches of plaintiffs' living quarters by describing the quarters as commercial premises. Defendants highlight the temporary, cramped, limited nature of the quarters. The rooms are: only provided to employees; adjacent to barns or above horse stalls; accessible by track authorities who have a master key; and very small—providing only one or two person occupancy. No cooking is permitted and some licensees do not choose to stay in the dorm room.

The detailed description of the dorm rooms does not persuade this Court that they qualify as a commercial premise for purposes of the Fourth Amendment. The crucial quality which the rooms possess is their exclusive residential use. *Serpas v. Schmidt,* Mem. Op. at 8-10. The other details of the plaintiffs' living conditions cannot deprive them of their constitutional rights to be free of unreasonable searches in their homes. The courts have viewed rooms similar to plaintiffs' quarters as homes. These rooms include hotel rooms, boarding house rooms, and college dormitory rooms. *See, e.g., Stoner v. State of California,* 376 U.S. 483 (1964); *Smyth v. Lubbers,* 398 F. Supp. 777 (W.D. Mich. 1975). Such private rooms have been found to be homes and residences although they share the very qualities the defendants argue make them "commercial": they are small, temporary, and accessible by a master key. The plaintiffs' rooms' proximity to the barns and stalls do not make them commercial; they are used for residential purposes exclusively.

Defendants, however, analogize the warrantless searches of plaintiffs' rooms to the warrantless searches of the baggage of persons boarding airlines, *United States v. Bonstein,* 521 F.2d 459 (2d Cir. 1975), *cert. denied* 97 S. Ct. 1211 (1976); of persons entering courtrooms, *McMorris v. Alioto,* 567 F.2d 897 (9th Cir. 1978); of prison guards, *United States v. Sihler,* 562 F.2d 349 (5th Cir. 1977); and of a parolee's residence pursuant to a consent provision in his parole terms, *United States v. Dally,* 606 F.2d 861 (9th Cir. 1979). These cases do not change the nature of the plaintiffs' quarters. The cases generally involve searches on public property—an airport, a courtroom, a prison. The search of a parolee in *Dally* was governed by the terms of a search consent which was a condition of a prisoner's parole. The *Dally* search was not characterized as an administrative inspection. Plaintiffs' situation is not analogous to individuals on parole from prison.

Therefore, the plaintiffs' living quarters are residential, not commercial. Their temporary and crowded conditions do not change their nature. Although employed in a highly-

regulated industry, the plaintiffs possess the constitutional right to be from unreasonable searches in their homes.

(B) *Statutory Authority for the Searches*

In other highly regulated industries, warrants are not required where statutory language authorizes the terms and conditions of searches of particular premises. *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining industry); *United States v. Biswell*, 406 U.S. 311 (1972) (gun dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor industry). The applicable statute in the Illinois horse racing industry reads, in pertinent part:

> (c) The Board, and any person or persons to whom it delegates this power, is vested with the power to enter the office, horse race track, facilities and other places of business of any organization licensee to determine whether there has been compliance with the provisions of this Act and its rules and regulations.

Illinois Horse Racing Act of 1975, 8 Ill. Ann. Stat. § 37-9 (Smith-Hurd Supp. 1980).

Defendants argued earlier and again urge the Court to find that the terms "race track" and "facilities" must include the dormitory rooms. Such a conclusion is said to be dictated by the track's ownership of the rooms, the rooms' location within the racetrack, the track's accessibility to the room for health and safety inspections, and the track's provision of the rooms to licensees at no charge. Defendants' Memo. at 19-20. None of these allegations change the exclusive residential nature and purpose of the rooms themselves.

Nor does the language of the statute support defendants' conclusion that the rooms are a "facility" or a "racetrack." The sentence specifically lists a series of places and ends with the general phrase—"and other places of business. . . ." This concluding phrase labels the earlier places as places of business. The most reasonable reading of "facility" or "racetrack" within the sentence is to find

that they are examples of places of business. Therefore, as this Court found earlier, there is "a complete dearth of statutory authorization for searches of residences or statutory limitations on any searches." Therefore, this Court "will not authorize what the legislature has not." Mem. Op. at [14].

(C) *Regulatory Powers as Authority for the Searches*

In the absence of specific statutory authority, the defendants argue that the power to conduct the warrantless searches of plaintiffs' living quarters may be inferred or implied from the broad regulatory powers of the Illinois Racing Board. Defendants rely upon *Balelo v. Baldridge*, 724 F.2d 753, 765 (9th Cir. 1984), to argue that the Board has been given extensive regulatory powers from which the power to search may be inferred. Other courts have viewed a warrantless administrative search as permissible *only* when the search is specifically authorized by a statute. *See, e.g., United States v. Biswell*, 406 U.S. 311, 315 (1972); *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1078 (7th Cir. 1983). This Circuit does not appear to recognize implied statutory authority for warrantless administrative searches. Even if this Circuit should determine to recognize inferred authority, the regulatory scheme in this case is inadequate.

Under *Balelo*, to determine whether warrantless searches in a closely regulated industry are reasonable, the court "must decide whether the regulatory scheme 'in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant.'" *Balelo v. Baldridge*, 724 F.2d at 765-66, *quoting in part, Dewey v. Donovan*, 456 U.S. at 603. The *Balelo* court found that a program of observers of fishing vessels, which collected data pursuant to the Marine Mammal Protection Act, was sufficiently regulated to provide an adequate substitute for a warrant. The court based its decision on several grounds: published regulations which clear-

ly defined the objective and purpose of the observer; regulations which limited the scope of the observer's activities; written manuals to define the observer's role; standardized forms to record observations; advance notice to the vessel's owner of an observer's presence; a pre-departure conference; and the manual's specific limits which "do not authorize the observers to conduct searches of the persons, personal effects, or living quarters of the Captains and their crews." *Balelo v. Baldridge*, 724 F.2d at 767. Moreover, no alternative method of enforcement existed aboard the vessel. *Balelo v. Baldridge*, 724 F.2d at 768 (Nelson, J., concurring).

The defendants urge the Court to find that the Board's regulatory scheme offers similar "certainty and regularity" of application and provides an adequate substitute for a warrant. In contrast to the *Balelo* regulations, however, the agents who conduct the living quarters' searches are not given written manuals, but "given instructions" on "how to carry out the searches." No further details of the nature of the instructions are offered. The search procedures include: having the agent identify himself; signing a written consent form or where no consent is given, the individual is reported to the steward; and providing individuals with a receipt if the agents take any property. Generally, rooms are searched only when an occupant is present and the agent has permission to enter.

These practices, however, do not impose any meaningful limitations on the agents' discretion. The searches may be focused or random and are not restricted to particular times nor restricted to particular areas or items in those areas which are in plain view. Unlike the observers in *Balelo*, the agents here may search plaintiffs' living quarters and personal effects as extensively as they wish. Plainly, the agents have an unrestricted scope of search; requiring them to hand out receipts or consent forms does not affect or limit the agent's discretion to undertake an exhaustive search of every personal effect in an individual's room. These practices fall short as an adequate substitute for a warrant.

(D) *Balance of Privacy Interests and Enforcement Interests*

In determining the reasonableness of a warrantless search, the Court must balance the enforcement needs of the government and the privacy interest of the plaintiffs. *See, e.g., Marshall v. Barlow's Inc.*, 436 U.S. at 31. The plaintiffs' interest is strong. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. . . ." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). Because of the constitutional protection afforded the home, the warrant requirement has been strictly applied to searches of the home. *Illinois Migrant Council v. Pillod*, 531 F. Supp. 1011, 1021 (N.D. Ill. 1982). Therefore, governmental authorities may not search the home without a warrant showing probable cause unless there are exigent circumstances. *Id.* at 1022. In *Camara v. Municipal Court*, the Court found that administrative warrants could authorize searches of dwellings for building code violations. 387 U.S. at 537-40. The Court articulated several factors which made the search reasonable, including: public interest in preventing or abating dangerous conditions; the history of such inspections; good alternate techniques to discover violations were not available; the searches were not personal in nature; and the searches were not directed toward discovering evidence of a crime. 387 U.S. at 536-37.

The defendants contend that although plaintiffs' privacy interests are great, the government's enforcement needs are greater. They argue the warrantless residential searches are reasonable and cite the long history of such warrantless searches in Illinois and elsewhere. But, primarily, defendants' arguments are focused on the public and the State's interests in maintaining the integrity of the horse racing industry—an industry prone to abuse by "undesireable elements." *Feliciano v. Illinois Racing Board*, 110 Ill. App.3d 997, 443 N.E.2d 261 (1st Dist. 1982). Specifically, defendants justify the warrantless searches because they serve as deterrents to violations, are justified by the "positive results"—contraband found during searches, and because less intrusive methods would be ineffective.

The deterrent effects of the searches cannot render them constitutional. Proof of such deterrence is speculative. The statistics of positive results from searches of the plaintiffs do not readily support the defendants' position. During 1981-1983, there were 361 reported searches of the plaintiffs' residences and persons. The stated purpose of such searches is to find illegal "buzzers" and drugs which could affect the results of the horse race. There appear to be approximately seven searches which produced these items. Affidavit of Leonard Becika, Exhibits A, B, C. These statistics do not justify the warrantless searches. While the individual character and integrity of the Board's licensees may reflect upon the character of the horse racing industry, this does not justify warrantless residential searches to insure that licensees possess no drugs used by humans in their homes.

The defendants also contend that these unannounced warrantless searches are the most effective method of enforcement and that other less intrusive methods would be ineffective. The element of surprise is deemed crucial to enforcement. The element of surprise and a warrant to search, however, may co-exist in an *ex parte* warrant. *Marshall v. Barlow's Inc.*, 436 U.S. at 319-20. This alternative would accommodate enforcement needs and the plaintiffs' privacy rights. The rest of defendants' enforcement scheme does not involve warrantless searches and can prevent the wrongs they seek to prevent. Defendants may continue to detain horses and conduct metal detector searches of them before the race, make searches of the commercial premises of the racetrack, and use drug testing techniques.

The defendants' enforcement needs do not outweigh the plaintiffs' privacy interests. The additional *Camara* factors—that the search not be personal in nature nor directed towards discovery of criminal evidence—are plainly not present here. Therefore, having considered both parties' interests fully, this Court finds the plaintiffs' privacy interest is superior and renders the warrantless searches of their homes unreasonable under the Fourth Amendment.

II. *Stops and Searches of Plaintiffs' Persons*

The plaintiffs have also challenged the warrantless investigative stops and searches of their persons, which take place anywhere within the racetrack enclosure. Defendants argue that these searches, like the residential searches, are sanctioned under the administrative search exception to the Fourth Amendment. Once again, defendants have the burden of showing statutory authority or even implied statutory authority for the warrantless searches. The statute authorizes the search of "facilities" and other commercial premises, but nowhere is there authorization for the search, not of a place, but of a person.[4] There is no statutory authority for the searches nor any limits placed on the searchers' discretion. The "orders" and procedures of the agents do not supply the requisite limits on discretion. *See supra*, at 9-12.

Moreover, as Judge Prentice Marshall noted in *Illinois Migrant Council v. Pilliod*, the Supreme Court has stated that administrative warrants authorize searches of commercial premises or property only—not the search of persons found on the premises. 531 F. Supp. 1011, 1020-21 (N.D. Ill. 1982). Finally, this Court has distinguished this case from *Wilkey v. Illinois Racing Board, et al.*, 74 C 3524, *aff'd*, 423 U.S. 802 (1975), and there are no reported opinions which permitted administrative searches of commercial premises and warrantless searches of licensees on the premises. Mem. Op. at [15-19].

III. *Conditioning License on Consent*

The plaintiffs' last challenge is directed to the conditioning of their occupation licenses upon their consent to be searched. Defendants argue that the plaintiffs have voluntarily consented to the searches by signing a statement to abide by Board Rule 332 and 25.19, which are printed on the application form. The defendants rely upon the doctrine of implied consent—that when plaintiffs entered their occupation, they agreed to abide by the industry's regulation. This Court has found, however, that the issue is not

whether consent can be implied, but whether, absent the condition, the challenged searches are constitutional. Mem. Op. at pp. 23-28. Standing alone, the searches of the residences and persons have been found to be unconstitutional because they violate plaintiffs' Fourth Amendment rights. Because these searches are unconstitutional, the license applications requiring consent to such searches are also unconstitutional. The Racing Board cannot issue a license conditioned on the applicant's consent to waive his or her Fourth Amendment protections. *Frost v. Railroad Commission*, 27 U.S. at 592-594.

Defendants argue, however, that the question of consent by plaintiffs raises a disputed question of material fact which bars plaintiffs' motion for summary judgment. The facts demonstrate that plaintiffs' signature and compliance was motivated by their fear of losing the license and the livelihood that could be available to them only through that license.[5] The forms cannot make reasonable the warrantless searches of plaintiffs' persons and homes. *Schneckcloth v. Bustamonte*, 412 U.S. 218 (1973).

IV. *Requirements for Permanent Injunction*

To gain injunctive relief, the plaintiffs must demonstrate that they have no adequate remedy at law and will suffer irreparable harm without an injunction. The plaintiffs have shown that in the absence of permanent injunction, they will continue to have their homes and persons searched without a warrant. Fourth Amendment violations have been deemed "irreparable harm" for purposes of gaining injunctive relief. *Illinois Migrant Council v. Pillod*, 531 F. Supp. 1011, 1023 (N.D. Ill. 1982). Additionally, the public has an interest in securing the plaintiffs' constitutional rights. The defendants will retain their full complement of enforcement procedures and will only be precluded from making unlawful searches and seizures. Therefore, plaintiffs have demonstrated that they are entitled to permanent injunctive relief.

V. *Defendants' Liability for Unlawful Acts*

Plaintiffs seek to have this Court hold defendants liable for authorizing and conducting the unlawful stops and searches of the named plaintiffs. Summary judgment is sought only on the issue of liability, not damages. Both parties agree that the applicable law of government official's qualified immunity is set out in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Supreme Court stated: "On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether the law was clearly established at the time."

To establish this qualified immunity as an affirmative defense, the defendants must demonstrate that the searches of the named plaintiffs were authorized when they were made. The standard requires the defendants to establish that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Defendants argue that the law of warrantless administrative investigations in closely regulated industries plainly authorized their searches. Reasonable people could have concluded they had the authority to conduct the searches. *Donovan* and *Camara* permitted administrative searches and defendants could have believed there were sufficient limits on the discretion of those conducting the search. Therefore, this court holds the defendants are not liable for authorizing and conducting the unlawful stops and searches of the named plaintiffs.

VI. *Discovery Sanctions*

Defendants have asked this Court to dismiss plaintiffs' action because plaintiffs failed to answer discovery demands. Plaintiffs invoked the Fifth Amendment in response to defendants' interrogatories about plaintiffs' possession or use of equine drugs, buzzers or mechanical devices, and cocaine or marijuana. Defendants assert that the information is requested to show the need for their searches and to develop a possible equitable defense of unclean

hands. At a minimum, defendants ask the Court to dismiss plaintiffs' damages claim.

Without addressing the necessity or relevance of the evidence requested, this Court finds that the plaintiffs' invocation of the Fifth Amendment does not warrant the extreme remedy of dismissal. Case law indicates that dismissal is an option only where the invocation of the right is improper and pretextual and the plaintiff has refused the court's order compelling discovery. *See, e.g., Campbell v. Gerrans*, 592 F.2d 1054, 1057-58 (9th Cir. 1979). Neither element is present here; plaintiffs' invocation is not improper and no court order issued. Plaintiffs have replied to discovery completely with this exception. Defendants are not entitled to dismissal.

VII. *Scope of the Injunction*

The defendants also raise an issue concerning the scope of this Court's injunction, if it issued. The plaintiffs seek relief against the named defendants and this Court's injunction binds them and "those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d). At this time, the Court grants the injunction against the named defendants.

VIII. *Probable Cause Requirement*

In its earlier decision, this Court conducted an extensive analysis of *Camara v. Municipal Court*, 387 U.S. 523 (1967) and concluded that under its rationale, an administrative warrant would be inappropriate and that defendants must procure a warrant based upon "the more vigorous standard of 'probable cause' used in criminal cases." Mem. Op. at [24-29]. At that time, the Court indicated that it would entertain a motion to modify the type of warrant required if further evidence were forthcoming. The evidence developed during discovery has not disturbed the Court's initial findings. Therefore, the Court finds that: (1) the harm resulting from violations of racing require-

ments is not comparable to the harm from "an epidemic or an uncontrollable blaze" in *Camara*; (2) there is no showing that defendants will be unable to regulate the industry effectively if probable cause is required for a warrant; (3) there are important privacy interests at stake and the searches are personal and aimed at discovery of criminal evidence; (4) there are no "reasonable legislative or administrative standards" for the searches. *See supra* at 8-12.

For the foregoing reasons the Court declares: that Thoroughbred Rule 322 and Harness Racing Rule 25.19 are unconstitutional under the Fourth and Fourteenth Amendments to the United States Constitution.

The Court permanently enjoins defendants from engaging in these acts pursuant to the Rules:

a. Conducting or authorizing searches and seizures of the persons and residential quarters of plaintiffs and the class they represent without warrants and probable cause;

b. Conducting or authorizing investigatory stops of plaintiffs and the class they represent without at least a reasonable suspicion, based on specific, articulable facts, that the person stopped is engaged in criminal activity; and

c. Conditioning the issuance of occupation licenses upon applicants' forfeiture of their constitutional right to be free from the searches authorized by Rules 322 and 25.19.

Finally, this Court holds that defendants are not liable to the named plaintiffs for authorizing and conducting unconstitutional searches of named plaintiffs' persons and residences.

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: July 11, 1985

[1] This Court certified these persons as a Rule 23(b)(2) class on September 19, 1983.

[2] The regulations are set forth in two rules, identical in language, which read as follows:

INSPECTIONS AND SEARCHES

a. The Illinois Racing Board or the state steward investigating for violations of law or the Rules and Regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the agents of any race track operator licensed by said Board; and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment, and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule may have his license suspended or revoked.

b. The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or designees of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

[3] The underlying facts of the action are set out in the preliminary injunction ruling. Mem. Op. at [1-4].

[4] Section 37-9(a) grants the Board jurisdiction over "all persons on organizational grounds." Section 37(d) authorizes the Board to "investigate alleged violations of the provision of this Act." Neither of these constitute authorization of the warrantless search of persons.

[5] Disputes over when consent for a single, particular search was given or what precise items were searched are not material questions of fact.

APPENDIX D

[Dated June 16, 1983]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DON SERPAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4715
	)	
CHARLES E. SCHMIDT, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, *District Judge*:

This matter comes before the Court on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss.[1] The three named plaintiffs are "occupation licensees" of the Illinois Racing Board and are currently employed as grooms with responsibility for the basic caretaking of horses at Arlington Park Racetrack. Each plaintiff lives in residential quarters located at the Arlington Park Racetrack. The quarters are owned by the race track and are

[1] Plaintiffs have also filed a motion for class certification. Because that motion is not yet fully briefed and because its resolution is not required at this time, that motion is not addressed in this opinion.

provided to plaintiffs in connection with their employment. The plaintiffs allege that these residential quarters have been searched and that they themselves have also been stopped and personally searched within the race track enclosure by agents of the Illinois Department of Law Enforcement.

Plaintiffs acknowledge that they signed forms in which they consented to a search of their persons and quarters, as was required in order to obtain their occupation licenses from the state. They also admit that they consented to each search at the time of its occurrence[2] because they understood that they must do so to retain their licenses. Each plaintiff alleges, however, that he would not have consented to the warrantless searches if such consent had not been necessary to obtain his license and pursue his means of livelihood.

The defendants agree that the searches described by plaintiffs did occur,[3] and that plaintifffs' receipt of a license was conditioned upon their consent to the searches, but maintain that the described events do not form the basis for a cause of action. According to defendants, the warrantless searches were authorized under state statute and regulations, were freely and fully consented to, and were constitutional.

The regulations upon which defendants rely, and under which plaintiffs consented to the searches, are set forth in two rules, identical in language, which read as follows:

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[2] There is a dispute between the parties regarding whether consent was obtained before or after a search of certain residential quarters (Aff. of Raymond Johnson, ¶8; Aff. of Robert Mage, ¶16); and the nature of the information conveyed by enforcement agents to plaintiffs concerning the ramifications of their failure to consent (see Defendants' Reply Memorandum, p. 7). For the purposes of the present motion, these disputes are not material.

[3] There is also a dispute between the parties regarding whether plaintiff Johnson's wallet was searched (Aff. of Raymond Johnson, ¶2; Affs. of Robert Mager and Dannie Pierce).

INSPECTIONS AND SEARCHES

a. The Illinois Racing Board or the state steward investigating for violations of law or the Rules and Regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment, and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule may have his license suspended or revoked.

b. The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees

> of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

Thoroughbred Rule 322; Harness Rule 25.19 (Exhibit A, Defendants' Memorandum in Support of Motion to Dismiss).

Plaintiffs do not challenge the constitutionality of searches of *non-residential* premises authorized by Rule 322 and 25.19 (Plaintiffs' Memorandum p. 2). They also do not contest the searches of persons other than those in the class which they seek to represent.[4] (Plaintiffs' Reply, p. 13). Accordingly, plaintiffs do not object to the searches of jockeys, stable searches or the testing of horses. (Plaintiffs' Reply, p. 13). Rather, they limit their challenge to (1) the warrantless searches of their residential quarters; (2) the warrantless investigative stops and searches of their persons while anywhere in the racetrack enclosure; and (3) the conditioning of their licenses upon their consent to such searches. For the reasons set forth below, this Court agrees that defendants must be enjoined from engaging in each of the three contested practices.

I. Residential Searches

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The basic purpose of this Amendment is clear: it is to safeguard the privacy and security of individuals against arbitrary invasions by gov-

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[4] Plaintiffs seek to represent "all occupation licensees of the Illinois Racing Board who are employed as exercise persons, grooms and hotwalkers at race tracks in Illinois and who reside in residential quarters at racetracks in Illinois." Plaintiffs' Motion for Class Certification, ¶1.

ernment officials. And, although it is sometimes difficult to "[translate] the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases, . . . [n]evertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 307 U.S. 523, 87 S.Ct. 1727 (1967) (citations omitted). Accordingly, the burden lies heavily upon defendants to show that the warrantless searches authorized under Rule 322 and 25.19 do not violate the plaintiffs' Fourth Amendment rights. *See, e.g., Wilson v. Health and Hospital Corp. of Marion Cty.*, 620 F.2d 1201, 1208 (7th Cir. 1980).

One "carefully defined class of cases" under which warrantless searches have been found constitutional by the Supreme Court involves administrative investigations of highly regulated industries. *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534 (1981) (mining industry); *U.S. v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593 (1972) (gun dealers); *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72, 90 S.Ct. 774 (1970) (liquor industry). Warrants were not constitutionally required in these cases because "Congress [had] reasonably determined that warrantless searches [were] necessary to further a regulatory scheme and the federal regulatory presence [was] sufficiently comprehensive and defined that the owner of commercial property [could not] help but be aware that his property [would] be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, 452 U.S. at 600, 101 S.Ct. at 2539.

Defendants urge that the present case falls within this exception because the race track industry is a highly regulated one, comparable to the gun, liquor, and mining industries. Clearly, the State of Illinois does closely regulate the race track industry and maintains a strong interest in ensuring its integrity. *Phillips v. Graham*, 86 Ill.2d 274, 427 N.E.2d 550 (1981); *Finish Line Express, Inc. v. City*

of Chicago, 79 Ill.2d 131, 379 N.E.2d 290 (1978). However, two other factors distinguish the present case from *Donovan*, *Biswell*, and *Colonnade*.

First, each of those cases involved searches of commercial premises, not residential quarters. This distinction is important, according to the Supreme Court:

> [U]nlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment*, legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment. . . The greater latitude to conduct warrantless inspections of commercial property reflects the fact that *the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home*, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. *United States v. Biswell, supra*, 406 U.S. at 316, 92 S.Ct. at 1596.

Donovan v. Dewey, 452 U.S. at 598-99, 101 S.Ct. at 2537-38 (citations omitted, emphasis supplied).[5] *See also, Steagald v. United States*, 451 U.S. 201, 101 S.Ct. 1642 (1981) ("we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable

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[5] The footnote designated with an asterisk in the text of the Supreme Court opinion reads:

> Absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant. *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). Of course, these same restrictions pertain when commercial property is searched for contraband or evidence of crime. *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 352-359, 97 S.Ct. 619, 628-632, 50 L.Ed.2d 530 (1977).

under the Fourth Amendment unless done pursuant to a warrant"); *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1021 (N.D. Ill. 1982) (that government seeks authorization to enter and search homes "poses a very different question," from one involving an administrative search of commercial premises).

Defendants, in response, state that they "are aware of and do not take lightly the Fourth Amendment protections afforded to persons in their homes." However, they argue, plaintiffs' quarters are not homes within the meaning of the Fourth Amendment:

> The dormitories here involved are only Plaintiffs' temporary quarters occupied incident to Plaintiffs' employment. The dormitories are adjacent to the barns where the horses are housed. A quick trip from a dormitory room to the barn is all it takes to change the course of a race. The named Plaintiffs all have permanent residences outside of the race track enclosure. Their living quarters are so intrinsically bound up with the racing industry that they must be considered a business establishment for Fourth Amendment purposes rather than residences. Under Plaintiffs' reasoning a liquor dealer who sleeps in his store at night could not have his establishment searched during the day.

Defendants' Reply, pp. 13-14.

These arguments are not compelling. What is critical is that plaintiffs' quarters are used exclusively for residential purposes. This factor distinguishes the present situation from defendants' hypothetical liquor store example. The proximity of the quarters to the barn is also irrelevant; Fourth Amendment protections would extend to a house used exclusively for residential purposes even if it were built in the middle of the race track. Finally, the fact that plaintiffs' economic circumstances and the nature of their job requires them to move from race track to

race track[6] cannot erase their constitutional rights to be free of unreasonable searches in those places which are their homes, however temporary. *Stoner v. State of California*, 376 U.S. 483, 490, 84 S.Ct. 889, 893 (1964) ("No less than a tenant of a house, or the occupant of a room in a boarding house . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures."). *See also, Smyth v. Lubbers*, 398 F.Supp. 777 (W.D. Mich. 1975) (college dormitory room is a "home" within the ambit of Fourth Amendment protections). Thus, the instant case is clearly distinguishable from the Supreme Court cases in which warrantless administrative searches were permitted because the facts here involve searches of residential, rather than commercial, premises.[7]

Second, the statutory authority for the searches in this case is far less specific than that at issue in the gun, liquor, and mining industry cases. The applicable statute here reads, in relevant part:

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[6] Plaintiffs argue that backstretch workers like themselves live on the race tracks at which they are currently working as a matter of economic necessity. When the racing season ends at one racetrack, the backstretch workers migrate immediately to new rooms on the track where the new season has commenced. And, continue plaintiffs, although some backstretch workers may have some family living elsewhere, the residential quarters on the racetrack are the homes in which the overwhelming majority of grooms, hotwalkers and exercise persons exclusively reside. Aff. of Joan Rappaport, ¶¶3-5.

[7] Defendants' citation of various state cases in which warrantless searches of racetrack facilities were upheld is also inapposite. In *State v. Dolce*, 178 N.J. Super. 275, 428 A.2d 947 (1981), the search was merely of commercial premises and of a trainer's truck. Likewise, in both *Federman v. State of Florida, Department of Business Regulation, Division of Pavi-Mutuel Wagering*, 414 So.2d 28 (Fla. Dist. Ct. App. 1982) and *Lancaster v. Pennsylvania State Horse Racing Commission*, 16 Pa. Commw. Ct. 85, 325 A.2d 645 (1974) searches of licensees' trucks were upheld. None of the cases involved residential premises.

> (c) The Board, and any person or persons to whom it delegates this power, is vested with the power to enter the office, horse race track, *facilities and other places of business* of any organization licensee to determine whether there has been compliance with the provisions of this Act and its rules and regulations.

Illinois Horse Racing Act of 1975, 8 Ill. Ann. Stat. §37-9 (Smith-Hurd Supp. 1980) (emphasis supplied).

This provision, in marked contrast to those involved in *Donovan*, *Biswell*, and *Colonnade*, does not specifically authorize warrantless searches of the particular premises searched. Although defendants argue that plaintiffs' residential quarters fall within the statutory term "facilities," such a construction of the statute is untenable, given this Court's determination above that the plaintiffs' quarters are residential homes. The term "facilities," when read in context of the entire provision, patently encompasses only business facilities.[8]

The fact that the statute does not explicitly authorize warrantless searches of residences raises serious doubts about defendants' contention that such searches are constitutional. Aside from the important difference in the places to be searched, i.e., residences as opposed to commercial facilities, the lack of express statutory mandate to search residences forces the defendants to rely on their own rules and regulations to justify their conduct. Defendants contend that even absent an explicit statutory basis, the rules permitting the searches must be presumed valid and given the force and effect of law under "well established administrative law principles." Defendants' Reply Memorandum, p. 12. The constitution and the Supreme Court, however, demand more when the invasion of people's homes by "investigators" is at stake:

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[8] No other reading would be reasonable: the word "facilities" is sandwiched between a list of obviously commercial premises and the clause "*other* places of business" (emphasis supplied).

> In the context of a regulatory inspection system of business premises that is carefully limited in time, place and scope, the legality of the search *depends* not on consent but *on the authority of a valid statute.*

U.S. v. Biswell, 406 U.S. at 315, 92 S.Ct. at 1596 (emphasis supplied). *See, Balelo v. Klutznick*, 519 F.Supp. 573 (S.D. Calif. 1981). The rationale for this requirement of an express statute

> is undoubtedly to be found in . . . *United States v. United States District Court*, 407 U.S. 297, 316, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972). [There the Court made a statement] regarding the traditional role of the detached and impartial magistrate in the issuance of a warrant, i. e., the magistrate assures that there is probable cause for the search and that the scope of the search is appropriately limited in time, place and scope. As the Court points out, an administrator cannot fulfill these traditional functions of the magistrate since he, himself, is the searcher. Congress, however, being elected by and responsive to the people, and presumably sensitive to their constitutional rights, comes closer to fulfilling the role of the magistrate than any administrator can. Accordingly, a properly drawn statute in appropriate cases may substitute for the warrant. *See, United States v. Cooper*, 409 F.Supp. 364, 368 (M.D. Fla. 1976), *aff'd.*, 542 F.2d 1171 (5th Cir. 1976). While the courts remain the ultimate arbiters of the reasonableness of a search even where authorized by Congress, . . . on the whole, deference has been shown to the congressional determination of the standard of reasonableness. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970).

Balelo v. Klutznick, 519 F.Supp. at 59-80 (citations omitted). Clearly, therefore, the fact that the Illinois legislature did not explicitly permit a warrantless search of plaintiffs' residences renders defendants' attempted justifications for any such searches constitutionally infirm; defendants may not rely upon regulations promulgated subsequently.

Even if the statutory provision, §37-9(c) were interpreted to authorize warrantless searches of residential premises,[9] defendants' argument must still fail. The Supreme Court, in its administrative warrant cases, has also demanded that the statute be specific and limited enough so as to provide "privacy guarantees." Some standards for conducting the authorized searches must be enunciated. This was emphatically stated by the Supreme Court in the 1981 case of *Donovan v. Dewey*:

> "Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Colonnade Corp. v. United States, supra*, 397 U.S. at 77, 90 S.Ct., at 777. In such cases, a warrant may be necessary to protect the owner from the "unbridled discretion[of] executive and administrative officers," *Marshall v. Barlow's, Inc., supra*, 436 U.S., at 323, 98 S.Ct., at 1826, by assuring him that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967).

Donovan, 452 U.S. at 599, 101 S.Ct. at 2538.

Donovan makes clear that in "notorious," highly regulated industries, subject to frequent administrative searches, a licensee's constitutionally cognizable privacy expectations are reduced, and warrantless searches are much more likely to be constitutional.[10] Nevertheless, the Court also makes clear that unbridled administrative discretion in searches will not be tolerated and that the statute must provide some specific limitations on such discretion. *See*

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[9] As indicated *supra*, I believe that such a construction is implausible.

[10] As noted above, *Donovan* involves, in both its facts and language, only searches of *commercial* premises.

also, Bionic Auto Parts and Sales, Inc. v. Fahner, 518 F.Supp. 582 (N.D. Ill. 1981) (applying the *Donovan* standards, the Court concluded that the used auto parts business was a special industry within the range of the *Colonnade* and *Biswell* cases, but that the statutory authorization for warrantless searches was nonetheless too broad, rendering the provision unconstitutional).

Similarly, in the two earlier cases of *Biswell* and *Colonnade,* the Court discussed both the limited nature of the dealer's justifiable expectations of privacy in a pervasively regulated business, and the need for an inspection system which "is carefully limited in time, place, and scope." *Biswell, supra,* 406 U.S. at 315, 92 S.Ct. at 1596. In *Biswell,* the Gun Control Act limited entry into the premises of a firearms or munitions dealer to business hours and specified that entry was to be "for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises." *Id.* at 311-312, 92 S.Ct. at 1594.

In *Colonnade,* the law provided that inspectors could enter premises of retail liquor dealers only during business hours and specified that a refusal to allow entry during the appropriate hours would result in the imposition of a fine. The Court allowed warrantless searches to transpire under that statute, but specifically held inadmissible under the Fourth Amendment evidence which had been seized by a forceable entry after the liquor dealer had refused to open a locked liquor storeroom. Given "this Nation's traditions that are strongly opposed to using force without definite authority to break down doors," the Court would not read a Congressional authorization for forced entry into the statute where none explicitly existed. "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Colonnade,* 397 U.S. at 77, 90 S.Ct. at 777.

Finally, in the seminal administrative inspection case in which the Court required the inspecting agency to obtain a warrant, the Court rejected the arguments that the ordinance involved provided enough protections for occupants without a warrant and that the warrant process could not function effectively in the area of municipal inspections. The Court said:

> Under the present system, when the [housing] inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the full limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization . . . The practical effect of this system is to have the occupant subject to discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

Camara v. Municipal Court, 387 U.S. at 532, 87 S.Ct. at 1732-33. *See also, Hometown Co-op. Apartments v. City of Hometown*, 495 F.Supp. 55 (N.D. Ill. 1980).

The statute in this case is woefully inadequate when measured against the standards established by the Supreme Court. The discretion of the inspectors is wholly unbridled; indeed, the statute here does even require the searches to be performed "at . . . reasonable times, and within reasonable limits and in a reasonable manner," as the deficient OSHA statute in *Marshall* did.

In weighing the reasonableness of the warrantless searches of plaintiffs' quarters, this Court has considered both the enforcement needs articulated by the government[11] and

[11] While defendants consistently urge that surprise warrantless searches are critical to the effective policing of the race track industry, there has been no specific showing that the government

(Footnote continued on following page)

the privacy interest of plaintiffs. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. at 31, 98 S.Ct. at 1825. Because of the historical legal protection afforded the home under our Constitution, and the complete dearth of statutory authorization for searches of residences or statutory limitations on any searches, this Court will not authorize what the legislature has not. The defendants are enjoined from conducting or approving warrantless searches of the residential quarters at Illinois race tracks.

II. Searches of the Person

The deficiencies which infect the statute and rules under the analysis in Part I also undermine defendants' argument that plaintiffs and the class which they seek to represent can constitutionally be stopped and personally searched whenever they are within the race track enclosure.

While defendants could at least argue that searches of residences were authorized under the term "facilities" in §37-9(c), there is absolutely no plausible argument available to them regarding statutory authorization for the search of persons. The language of the section solely involves "places."[12]

Also, the failure of the legislature to provide sufficient safeguards against the "unbridled discretion" of the in-

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[11] *continued*
must be able to search those persons and areas of which plaintiffs complain. To note that the residential quarters are near the stables is insufficient. Supplying data which indicates that in 1981, agents conducted 430 searches at Illinois race tracks with 77 "positive results," without specifying which, if any of these searches involved persons in the class which plaintiffs seek to represent, or took place in their residential quarters, also is not persuasive.

[12] §37-9(a) does vest the Board with jurisdiction over "all persons on [the] organization grounds" and §37(d) does empower the Board to "investigate alleged violations of the provisions of this Act." However, neither of these could be construed as an explicit authorization of the warrantless search of persons.

vestigator poses no less serious a threat to the constitutionality of the rules as applied to plaintiffs in this context than in that addressed in Part I.

Finally, there are no reported opinions in which warrantless administrative inspections of commercial premises were permitted and warrantless searches of the *licensees* on the premises were also allowed. As Judge Prentice Marshall said in this Court:

> *Warrants to search premises simply do not authorize the seizure of persons found on the premises. See Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 1658, 68 L.Ed.2d 38 (1981) (Warrants to search are issued for different reasons and to service different interests than warrants to arrest persons). The Court has stated that administrative warrants authorize the search only of "commercial property," *see Donovan v. Dewey*, 452 U.S. 594, 599, 101 S.Ct. 2534, 2538, 69 L.Ed.2d 263 (1981), or for inspection of property, *see Camara v. Municipal Court*, 387 U.S. at 534-39, 87 S.Ct. at 1733-36. The Court has never held that an individual may be searched or seized on anything less than reasonable suspicion that he engaged in criminal activity. *See Michigan v. Summers*, 452 U.S. 692, 699, 101 S.Ct. 2587, 2592, 69 L.Ed.2d 340 (1981); *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 1890 (1980) (per curiam). Thus, assuming without deciding that INS may utilize administrative warrants to search commercial premises, it may not use such warrants to search or seize individuals found on the premises.

Illinois Migrant Council v. Pilliod, 531 F.Supp. 1011, 1020-21 (N.D. Ill. 1982) (footnote omitted).

Defendants, however, do cite an unreported opinion rendered by a Three Judge Court in this District, and affirmed summarily by the Supreme Court. *Wilkey v. Illinois Racing Board, et al.*, 74 C 3524, *aff'd* 423 U.S. 802, 96 S.Ct. 9 (1975). From a careful reading of the memoranda submitted to the Three Judge Court, the transcript

of the oral argument before the court (which became the opinion in the case), and the materials submitted to the Supreme Court, the following is revealed.

Dr. Wilkey, the plaintiff, was a veterinarian licensed by the Illinois Racing Board. The Illinois Bureau of Investigation sought Dr. Wilkey's consent to be personally searched at a race track stable, pursuant to information received from the Chief Chemist that Dr. Wilkey might have been administering a drug to horses. Defendants therefore argued in that case that they had probable cause for their search. Defendants' Reply, Exhibit O, p. 54a. When the Doctor refused to allow his person to be searched, he was required to appear before the race track stewards. After a hearing before that body later the same day, Dr. Wilkey's license was suspended due to his failure to comply with Rule 322 allowing the search of his person. The Doctor did not appear before the full Racing Board at a hearing scheduled on his case, and chose instead to challenge the constitutionality of the rule in federal court.

A preliminary injunction was granted in this Court but the Three Judge Court which subsequently heard the case reversed and found Rule 322 constitutional. As the rationale for its holding, Judge Swygert stated for the panel:

> [We have concluded that] the principle and rationale of *Colonnade* and the *Biswell* cases, decided by the Supreme Court of the United States, are controlling; that the fact that one dealt with a liquor dealer's regulation and the other a gun dealer's regulation and this deals with the regulation of horse racing; that that is a difference without distinction. We feel those two cases are applicable and that they control our decision leading us to say that this rule is constitutional and is not subject to the attack to which it has been subjected in this lawsuit.

Judge Kirkland added:

> I think the Court should take judicial notice that we all can recognize that racing is an industry that requires reasonable regulation. It is in the public in-

> terest to face squarely the problem of doping horses, the problem of fixing rules and all the problems that relate to that. I think Rule 322 addresses that problem and addresses that problem in a reasonable manner, which is not violative of the Federal Constitution.

Transcript of Proceedings, No. 74 C 3524, pp. 20-21.

While Dr. Wilkey is not in the class of persons which plaintiff seeks to represent, the *Wilkey* case did squarely address the constitutionality of personal searches of Board licensees, and thus must be reconciled with this Court's conclusion that the searches of plaintiffs' person are unconstitutional under the statute as now written.

The *Wilkey* decision clearly turned on the Three Judge Court's assessment of the public dangers inherent in the horse racing industry and the concomitant strong governmental interest in strictly regulating it.[13] With these assessments this Court has no quarrel. However, it appears that the Three Judge Court concluded that this finding was sufficient, under *Colonnade* and *Biswell*, to render the challenged rule constitutional. Even if such an interpretation of those two cases was reasonable at the time that *Wilkey* was decided, it does not square with the Supreme Court's recent, more detailed discussion of administrative searches in *Marshall v. Barlow, Inc.* (OSHA case, 1978) and *Donovan v. Dewey* (mining case, 1981). As discussed above, these cases, especially *Donovan*, make clear that

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[13] Plaintiff did argue in both his memoranda and at oral argument, that the statute and rules failed to provide effective and proper limits to the inspector's discretion in searching plaintiff. The defendants' response was that the regulations were specific enough to overcome any challenge. See Defendants' Exhibit O, p. 58a. This rebuttal is insufficient, however, as explained in Part I, *supra*. Even if the rules do set forth clear limitations, the constitutional concern is addressed to the specificity of limitations in the statute. Moreover, there is no indication in the Three Judge Court transcript that that panel gave the issue of specific limitations the attention which *Donovan* now makes clear it deserved.

this Court's assessment of the "reasonableness" of a search under an administrative warrant requires two steps. Not only should the Court review the enforcement needs regarding the particular industry in question; it also must inquire "whether the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." *Donovan*, 452 U.S. at 603, 101 S.Ct. at 2540. *See also, Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F.Supp. at 585 (1981). Privacy guarantees must be made; the inspector's discretion cannot be "unbridled."

The Supreme Court's affirmance of *Wilkey* was a summary disposition in which the Supreme Court gave no indication as to its reasoning, what facts it considered to be important, or even whether its disposition was based upon constitutional grounds. Conceivably, the Supreme Court was impressed with the facts of the *Wilkey* case, and the probable cause that the inspectors had had in searching Dr. Wilkey. In discussing the weight to be accorded to summary dispositions, Chief Justice Burger has explained,

> When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached. . . Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may have appeared to establish. (Citation omitted.)

Fusari v. Steinberg, 419 U.S. 379, 95 S.Ct. 533, 541 (1975) (Burger, J., concurring).

This Court has concluded, for the reasons set forth above, that the statute here does not meet the second component of the Supreme Court's requirements as clearly articulated in recent opinions: the statute fails to expressly authorize warrantless searches of persons, or to establish any limitation whatsoever on the timing and scope of permitted searches. Accordingly, despite *Wilkey*, this Court

must enjoin the Racing Board from authorizing or enforcing warrantless searches of the persons of plaintiffs and the class they seek to represent.

III. Licensure Conditioned Upon Consent

Plaintiffs lastly object to the conditioning of their license upon their consent to be searched. This objection also has merit.

It has long been held by the Supreme Court that the government may deny an individual a benefit for a reason which infringes an individual's constitutional rights. *See, e.g., Frost v. Railroad Commission*, 271 U.S. 583, 46 S.Ct. 605 (1926). In *Frost* the Supreme Court recognized that the state could not constitutionally compel the plaintiff truckers to become "common carriers" and be regulated by the Railroad Commission; they also assumed, on the other hand, that the state could properly withhold a particular benefit entirely—the use of the public highways. This parallels the instant case because defendants cannot constitutionally search the persons and residences of plaintiffs. The legislature could, however, ban horse racing entirely and refuse to issue any licenses in this industry.[14] *See, e.g., Finish Line Exp., Inc. v. City of Chicago*, 72 Ill.2d 131, 379 N.E.2d 290 (1978). Moreover, it is clear that in both cases, once the state does choose to allow the industry to exist, in a regulated form, there are some conditions which it can properly exact from its licensees.

These parallels between *Frost* and the instant case make the conclusion of the *Frost* Court and the rationale expressed therein highly persuasive here:

> The naked question which we have to determine, therefore, is whether the state may bring about the

[14] Horse racing in its present form obviously involves gambling. "It is undisputed that gambling is an activity which is subject to regulation or to complete prohibition." *Finish Line, supra.*

same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. Upon the answer to this question the constitutionality of the statute now under review will depend.

There is involved in the inquiry not a single power, but two distinct powers. One of these, the power to prohibit the use of the public highways in proper cases, the state possesses; and the other, the power to compel a private carrier to assume against his will the duties and burdens of a common carrier, the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective process of requiring a surrender, which though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the

> proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost v. Railroad Commission, 271 U.S. at 592-4, 46 S.Ct. at 607. *See also, Spevak v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967) (license to practice law cannot be conditioned upon waiver of Fifth Amendment rights); *Balelo v. Klutznick*, 519 F.Supp. 573, 580 ("government may not condition a privilege, (especially to pursue one's livelihood) upon compliance with an unconstitutional requirement").

Defendants' first response to *Frost* and its progeny is that a Racing Board occupation license is not conditioned upon the relinquishment of a constitutional right because no constitutional deprivations arise in this case. However, once it has been determined, as here, that constitutional violations have occurred, this argument must fall.

Defendants' also cite a case in which the Illinois Supreme Court held that:

> . . . one who applies for and is issued a permit to sell alcoholic beverages thereby assents to the reasonable lawful conditions imposed by statute and rule and find that due to the potentiality of criminal activity in the liquor business there is no constitutional objections to requiring consent to a warrantless search as a prerequisite to the issuance of a liquor license. The State of Illinois could completely prohibit the sale of liquor, but having instead chosen to regulate it, any restriction or requirement such as consent to a warrantless search, which is necessary to protect

> public health, safety and moral, is a reasonable exercise of the police power of the State. [Citations omitted].

Daley v. Berzanskis, 47 Ill.2d 395, 269 N.E.2d 716 (1971). This case, although on its face antithetical to *Frost*, can be reconciled with it in a manner which is instructive here. In reality, *Daley* does no more than restate the answer to defendants' first argument above.

Frost allows the conditioning of governmental privileges, as does *Daley*, provided that the conditions do not require the "relinquishment of constitutional rights." *Daley* requires that the conditions imposed be "reasonable and lawful." Since a Fourth Amendment violation arises only if a search is unreasonable, both cases mandate a balancing of the enforcement needs in a given industry and the privacy guarantees provided. It is no surprise that the *Daley* court found a warrantless search of a liquor dealer's commercial premises a "reasonable" exercise of the police power of the State; the Supreme Court concluded that such searches were reasonable, and therefore constitutional in *Colonnade*.[15]

Colonnade, *Biswell*, *Donovan* and *Daley* all make clear that governments may extract from licensees, especially in industries such as that involved here, the relinquishment of certain rights which under other circumstances would be protected by the Constitution. Thus, while in most instances, the warrantless search of premises is unreasonable, and therefore unconstitutional, in certain industries, when governed by clear statutory authorization and safeguards, those searches are reasonable and constitutional. In these latter cases, licensure may be condi-

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[15] This Court is not saying that the warrantless searches of liquor premises is constitutional under the applicable Illinois statute. What is important is that the Supreme Court of Illinois apparently premised its holding that the consent prerequisite to licensure was constitutional on the fact that the warrantless search of liquor premises was reasonable, and therefore constitutional.

tioned upon consent to those reasonable and constitutional searches.

Obviously, that point at which the line will be drawn between permissible and impermissible conditions must be determined on a case by case basis, utilizing the standards of constitutional reasonableness discussed at length in the preceding section of this opinion. *See, See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737 (1967). In this case, the conditions imposed on plaintiffs are unconstitutional.[16]

IV. Preliminary Injunction

Through their showing that their constitutional rights have been violated, plaintiffs have demonstrated that they will suffer irreparable harm for which they have no adequate remedy at law; that there is a strong probability they will ultimately succeed on the merits; that the harm they will suffer outweighs that likely to be experienced by defendants; and that considerations of the public interest militate in favor of the relief they seek. *See Decker v. United States Dept. of Labor*, 473 F. Supp. 770 (E.D. Wis. 1979), *aff'd* 661 F.2d 598 (7th Cir. 1980). On the basis of these factors, a preliminary injunction is appropriate. *Ekanem v. Health & Hospital Corporation of Marion*

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[16] This Court's conclusion that consent was impermissibly obtained from plaintiffs by means of their licensure application, obviously disposes of any argument that defendants could raise claiming that the searches were proper because they were consented to. Consent secured only from a fear unconstitutionally imposed that one's license will not be granted or will be revoked is not full and free consent within the meaning of the Supreme Court's requirements. Moreover, any factual dispute concerning the exact circumstances surrounding the consent given by plaintiffs at the time of their searches is immaterial to the question of whether an injunction is appropriate here. Regardless of the minor differences in the factual descriptions of the particular searches complained of, there is a strong likelihood of unconstitutional conduct occurring in the future, due to the broad authorization to search contained in Rule 322 and 25.19.

County, 589 F.2d 316, 319 (7th Cir. 1978); Wright and Miller, Federal Practice and Procedure, Civil §2948 (1973). The only question remaining regards the form that the injunction should take. While this opinion makes clear that searches of plaintiffs and their residential quarters is impermissible if done without any search warrant, it remains an open question whether defendants may now conduct such searches after obtaining an administrative warrant or whether they must procure a warrant based on the more rigorous standard of "probable cause" used in criminal cases.

Animating this Court's choice between these standards for warrants are four considerations: (1) the horse racing industry is one which is highly regulated and one in which the government's enforcement needs are very strong; (2) the searches are to be of residential quarters and persons, not commercial premises; (3) the purpose of the searches is to recover evidence of criminal activity, violative of the racing laws; and (4) the legislative and administrative "standards" for conducting these searches are nonexistent, or at best, broadly defined.

These four considerations were the foundation for the Supreme Court's decision in *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727 (1967), the leading case in which the Supreme Court discussed the appropriateness of an administrative warrant. There the Court had held that a municipality could not conduct warrantless housing inspections but concluded that the government did not need to establish probable cause that each dwelling it would enter contained violations of the municipal code. Rather, said the Court, if the "area inspection" sought "was a 'reasonable' search within the meaning of the Fourth Amendment," and "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular building," then the requisite "probable cause to issue a warrant to inspect must exist." *Id.* at 538, 87 S.Ct. at 1735-36. An administrative warrant would suffice.

In considering whether a particular kind of search requested was "reasonable", the Supreme Court employed a balancing test utilizing the first three factors which this Court finds important:

> In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.
>
> Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety . . . In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.
>
> There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures. It is here that

> the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building. Appellee contends that, if the probable cause standard urged by appellant is adopted, the area inspection will be eliminated as a means of seeking compliance with code standards and the reasonable goals of code enforcement will be dealt a crushing blow . . .
>
> Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. But we think that a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections. First, such programs have a long history of judicial and public acceptance. *See Frank v. State of Maryland*, 359 U.S., at 367-371, 79 S.Ct. at 809-811. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve relatively limited invasion of the urban citizen's privacy.

Id. at 534-37, 87 S.Ct. at 1734-35. Thus, in this passage, the Supreme Court considered (1) the governmental interest in regulation in the housing field and the concomitant need for either warrantless searches or searches based merely upon administrative warrants; (2) the scope of the searches—the type of premises covered and whether searches were "personal in nature"; and (3) whether the searches were "aimed at the discovery of evidence of a crime."

Finally, the *Camara* Court concluded that sufficient probable cause would exist if a fourth consideration were met: "*if reasonable legislative or administrative standards* for conducting an area inspection *are satisfied* with respect to a particular building.

> Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

Id. at 538, 87 S.Ct. at 1736.

Applying the four considerations enunciated in *Camara* to the instant case fails to provide an easy answer.

First, the illicit drugs and other devices which the government says are prevalent in this industry can be very easily hidden, and clearly would not be observable absent careful searches. More importantly, the history of governmental regulation in the horse racing industry is probably more well-established than that in the public health and housing arena. The government does have a keen interest in maintaining the integrity of the industry.

However, unlike the public harm which may develop a community in an epidemic or an uncontrollable blaze, and which justified the need to ensure "universal compliance" among property owners in *Camara*, the harm resulting from the failure to comply with certain racing requirements, although a grave problem, cannot be said to rise to the same level.

Moreover, defendants have failed to prove that they will be unable to effectively regulate the industry if a showing of traditional probable cause is required. As noted above, defendants have provided data regarding the number of race track searches conducted each year and the number of "positive results" achieved. Defendants' Reply Memorandum, Exh. N, ¶3. However, these figures not

only fail to specify whether any of the plaintiff class or their residences were searched and what a "positive result" entails, they also leave unanswered the question of how many searches could not have been made if a traditional probable cause standard for warrants had been utilized.

Other cases cited by defendants also fail to show that the Board could not effectively regulate the racing industry if it were required to establish traditional probable cause in order to obtain a warrant. In the *Wilkey* case, discussed in Part II, the defendants searched the plaintiff veterinarian after receiving information based on lab tests; the traditional probable cause requirements were met. Likewise the race track inspection regulations discussed in another case cited by defendants authorized searches of certain commercial premises only after inspectors received written notice from the official chemist that a specimen has been found "positive" for specified illegal substances. *State v. Dolce*, 178 N.J. Super. 275, 428 A.2d 947 (1981). These examples stand starkly before this Court; the defendants have failed to provide convincing arguments to the contrary.

Thus, while the government's need to regulate the race track industry is undeniably strong, defendants have not established that this need could not be met if they must show traditional probable cause in order to obtain a valid search warrant. Defendants therefore fail to persuade this Court regarding the first element of its consideration.

Second, the privacy interests at stake in the present case are greater than those in *Camara*. While *Camara* did involve the search of private dwellings, as are some of the challenged searches in this case, the *Camara* Court emphasized that no searches there were "personal in nature," as they can be under Rules 322 and 25.19. This distinction was emphasized by this District Court in *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011, 1021 (N.D. Ill. 1982) where the Court concluded that even if the Immigration and Naturalization Service "may utilize

administrative warrants to search commercial premises it may not use such warrants to search or seize individuals found on the premises." Third, in this case defendants *are* specifically searching for criminal evidence, *see* Defendants' Reply, pp. 3-4, Exh. J, ¶3, Exh. N, ¶3, a factor which the *Camara* Court indicates should be given great weight.[17]

Finally, the *Camara* requirement of "reasonable legislative or administrative standards" for the type of searches desired is also lacking here. In neither the applicable statute nor regulations are any standards established.

On the basis of these considerations, this Court concludes that an administrative warrant is inappropriate; to conduct stops and searches of the plaintiffs, and searches of their residences, a showing of traditional probable cause will be necessitated. Obviously, however, this order is one for a preliminary injunction and this Court will entertain motions to modify the order as to the type of warrant required, if further appropriate evidence were to be presented on this point.

Absent such evidence in the record at the present time, this Court shall enjoin defendants from:

(1) Conducting or authorizing any other persons to conduct searches and seizures of the persons and residential quarters of all occupation licensees of the Illinois Racing Board who are employed as exercise persons, grooms and hotwalkers at race tracks in Illinois and who reside in residential quarters at race tracks in Illinois, without search warrants and without probable cause;

(2) Conducting or authorizing any other persons to conduct investigatory stops of all occupation licensees of the Illinois Racing Board who are employed as exercise per-

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[17] Obviously, however, this alone cannot be dispositive, since searches of the type in the *Colonnade* (liquor dealer) and *Biswell* (gun dealer) cases obviously were intended to result in evidence of criminal activity; there no warrants at all were required.

sons, grooms and hotwalkers at race tracks in Illinois and who reside in residential quarters at race tracks in Illinois without probable cause or without a reasonable suspicion based on specific, articulable facts that the person stopped is engaged in criminal activity; and

(3) Conditioning the issuance of occupation licenses upon applicants' forfeiture of their constitutional right to be free from the searches permitted by Thoroughbred Rule 322 and Harness Racing Rule 25.19.

V.

For the foregoing reasons, defendants' motion to dismiss is denied, and the preliminary injunction set forth in Part IV is entered. So ordered.

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: June 16, 1983